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特　　集　：アジアにおける立憲主義の諸相―アジア的「文脈」とその論理―

Special Features　：　Multiple Aspects on Constitutionalism –Asian “Contexts” and its Logic

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Center for Asian Legal Exchange

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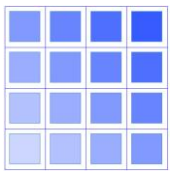

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特集

アジアにおける立憲主義の諸相
—アジア的「文脈」とその論理—

本特集は、2020 年 1 月 25 日-26 日、名古屋大学にて開催した 2019 年度名古屋大学「法整備支援の研究」全体会議「アジアにおける立憲主義の諸相—アジア的「文脈」とその論理—」（名古屋大学法政国際校育協力研究センター・大学院法学研究科主催）の報告者による寄稿論文である。本会議は、日本学術振興会・研究拠点形成事業 B アジア・アフリカ学術基盤形成型「アジア型立憲主義の解明—人権保障と法的安定性強化のための研究ネットワーク」及び科学研究費補助金・基盤研究(B)「ASEAN 共同体発足と異形の「憲法」像の登場」の助成を受けて実施した。

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Special Features

Multiple Aspects on Constitutionalism –Asian “Contexts” and its Logic Perspective

This special feature is composed of research articles which initially were presented in the form of reports at the Fiscal year 2019 International Conference on Legal Assistance Studies - ‘Multiple Aspects on Constitutionalism –Asian ‘Contexts’ and its Logic’, which was organized by the Center for Asian Legal Exchange and the Graduate School of Law of Nagoya University on January 25 and 26, 2020. This conference was supported by the JSPS Core-to-Core Program: Asia-Africa Science Platforms ‘Advancing Research in Asian Constitutionalism - Establishing a Transnational Research Network to Promote Human Rights and Legal System’ and JSPS Grant-in-Aid for Scientific Research – KAKENHI-(B) ‘Commencement of the ASEAN Community and the Emergence of Heterologous Constitutional Profiles in the Region’.

【Special Features: Multiple Aspects on Constitutionalism –Asian "Contexts" and its Logic】

Theoretical Foundations for Asian Constitutionalism: The Case of Singapore

THIO Li-ann*

Abstract

A contextual approach is key to understanding the nature and purpose of constitutions beyond the generic function of regulating public power. The Singapore constitution, which establishes a parliamentary system of government, is a hybrid of US-British influences, which has been developed along an autochthonous track in terms of both experimental institutional design (like the elected presidency with limited executive powers, unelected parliamentarians and multi-member constituencies with guaranteed ethnic representation) and rights jurisprudence, with an overt normative commitment to communitarianism. This operates within a neo-Confucianist political culture where ideas of the honourable gentleman ("君子") influences the law of political defamation and the rationale for laws regulating online falsehoods, given the emphasis on honesty and integrity in public discourse. Relational constitutionalism is an aspect of the Singapore approach towards manages inter-religious disputes, where the goal is to use a mix of formal and informal regulation to keep civil peace, relational welfare and social resilience, rather than to insist only on rights and legal sanction. In understanding the Singapore constitutional experience, one must appreciate that Law is not just a tool to constrain power but to serve efficient governance. Given the premium placed on political stability as essential to economic development, the rule of law is qualified by considerations of necessity through strict anti-subversion legislation. In terms of constitutional identity, aversive constitutionalism is displayed in the divergent approach towards race and religion Singapore adopts, compared to Malaysia, which it seceded from in 1965.

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I. Introduction

Constitutionalism is a site of confluence where "national history, custom, religion, social values and assumptions about government meet positive law."[1] As such, context is key to apprehending a constitution in terms of the political philosophy which affects the development of a constitution as a living institution[2] and in terms of its jurisprudence.[3] The primary objective of generic constitutionalism is to regulate the exercise of public power, whether in terms of constraint or in facilitating government action to secure fundamental principles and values.

Power, justice and culture may be identified as the three general elements of constitutionalism. All constitutions grapple with the Madisonian conundrum of empowering and restraining *power*,[4] reflected in the structuring of institutions for decision-making. They espouse principles of *justice* operating from the premise of universal applicability, such as the concept of democracy, the rule of

[1] 'Introduction', *Constitutional Systems in Late Twentieth Century Asia*, LW Beer ed., (University of Washington Press), 2. For general works on Singapore, see Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012); Kevin YL Tan, *The Constitution of Singapore: A Contextual Analysis* (Hart Publishing 2015); Li-ann Thio and Kevin Tan, *Evolution of a Revolution: 40 years of the Singapore Constitution* (Routledge-Cavendish, 2009).

[2] The Constitution is a living institution in the sense that in the first instance it is "a set of ways of living and doing. It is not, in first instance, a matter of words or rules. It rests on people behaving in certain patterns." Karl Llewellyn, 'The Constitution as an Institution' (1934) 34 Columbia Law Review 1 at 17-18

[3] See generally, Thio Li-ann, Principled Pragmatism and the 'Third Wave' of Communitarian Judicial Review in Singapore in *Constitutional Interpretation in Singapore: Theory and Practice*, J Neo ed., (Routledge, 2016). 75-116

[4] "But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." *Federalist* No. 51.

law and human rights, although there are varied conceptions in terms of how to implement them.[5] The *cultural* element is "specific and particularistic" and may be pre-political or politically constructed by governing elites.[6]

In a nutshell, the Singapore model of constitutionalism is a hybrid of US-British influences, with a distinctive autochthonous stamp in terms of an overt normative commitment to communitarianism.[7] This has informed constitutional experiments in institution-building and jurisprudence, grounded in the adaptation from Euro-American civilisations of values and legal transplants like "parliamentary democracy and the rule of law."[8] In this context, 'law' is viewed not only as a tool for constraining power and ensuring a 'government of laws' and not men, but also as an instrument to facilitate effective and efficient government and to implement the goals of a developmentalist strong state.

As an aspect of its British colonial legacy, the Singapore constitution is a "modified" version of "the doctrine of the separation of powers", accommodating "the Westminster model of parliamentary government."[9] The "efficient secret" of the English Constitution is reproduced with "the nearly complete fusion of the executive and legislative power", through the "connecting link" of the Cabinet, which is "a committee of the legislative body selected to be the executive body."[10] This system of government is centred on political constitutionalism, a reliance on political checks and balances like ministerial responsibility to Parliament and robust democratic checks.

The American influence is represented in the American style model of *Marbury v Madison* type judicial review which aims to weaken the efficiency of the political branches, where the courts can strike down unconstitutional legislation.[11] Part IV of the Singapore constitution also contains a justiciable bill of rights, reflective of legal constitutionalism**.** This is limited by ouster clauses or

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[5] On the rule of law in Singapore see Thio Li-ann, Between Apology and Apogee, Autochthony: The Rule of Law beyond the rules of law in Singapore, (July 2012) SJLS 269

[6] Donald Lutz, 'Thinking about Constitutionalism at the Start of the Twenty-First Century (2000) 30(4) Publius 115-135.

[7] Paragraph 30, shared values white paper (Singapore Parliament, Cmd 1 of 1999) ("While stressing communitarianism, we must remember that in Singapore society the individual also has rights which should be respected, and not lightly encroached upon. The Shared Values should make it clear that we are seeking a balance between the community and the individual, not promoting one to the exclusion of the other.") The Chief Justice noted that "a prominent feature of our cultural substratum, which is an emphasis on communitarian over individualist values." Sundaresh Menon, 'Executive Power: Rethinking the Modalities of Control (2019) 29 Duke Journal of Comparative and International Law 277-305.

[8] Para 29, Shared values white paper.

[9] Chan Sek Keong J, *Cheong Seok Leng v PP* [1988] 2 Malayan Law Journal (MLJ) 481, 487.

[10] Walter Bagehot, The English Constitution (1867), available at http://derecho.itam.mx/facultad/materiales/proftc/herzog/

The%20english%20constitution%20walter%20bahegot%20adobe.pdf

[11] This is not explicitly provided for in the constitution, although article 93 vests judicial power in the judiciary and the case law supports this type of judicial review. Public Prosecutor v *Taw Cheng* Kong [1998] 2 SLR (R) 489 at [89] "The courts, in upholding the rule of law in Singapore, will no doubt readily invalidate laws that derogate from the Constitution which is the supreme law of our land."

'notwithstanding' clauses, which preclude judicial review, such as in relation to the Internal Security Act, an anti-subversion law which authorizes detention without trial, violating fundamental liberties relating to personal liberty and criminal due process. In this instance, faith is placed in non-judicial or political checks like Parliament or the President who may in his personal discretion 'veto' a detention order is an advisory board recommends release of a detainee, contrary to the decision of the executive.[12] Originally directed primarily at communists and criminal triads, it has mainly been exercised against terrorists, though there is a lingering fear it may be used to suppress political dissenters.[13] Necessity thus qualifies the rule of law.

Nonetheless, Singapore distinguishes itself from the dominant western liberal model of constitutionalism, whose chief features (at the risk of gross simplification) is the prioritization of individual autonomy and the idea of a 'neutral state' which does not interfere with the pursuit of individualised conceptions of the good, is agnostic and does not judge between competing worldviews and disavows interest in the character of its citizenry. This finds expression in a rights-oriented court-centric ('ROCC') model of constitutionalism. In contrast, illiberal or non-liberal societies reject liberal values in according primacy to the interest of the community and a shared conception of the good which entails promoting a certain ethos among citizens. In terms of typology, Singapore would be described as practising a non-liberal, illiberal or even authoritarian form of constitutionalism,[14] though more accurately, all constitutions have a mix of liberal and non-liberal elements.[15]

Singapore had no 'constitutional moment' in the form of a constituent assembly as she was weighed down with the more immediate socio-economic concerns of nation-building, including problems of unemployment, housing and maintaining social cohesion in the face of threats posed by communism and ethnic-religious communalism. The existing state Constitution of Singapore was retained with consequential amendments to reflect state independence; early plans to draw up a new constitution to entrench democratic practices and minority rights were abandoned.[16] It is not surprising that constitutional pragmatism was a driving force behind the adoption of the Republic's first constitution, which was concerned with what was serviceable rather than high idealism. Indeed, Singapore has been described as an 'accidental nation', as the intention of the departing British

[12] Article 151, Singapore Constitution.

[13] Such as in the case of the detention of about 20 people in the so-called 'Marxist conspiracy' of the late 1980s. See Michael Hor, 'Law and Terror: Singapore stories and Malaysian dilemmas' in Global Anti-Terrorism Law and Policy (CUP, 2005)

[14] Mark Tushnet, 'Authoritarian Constitutionalism' (2015) 100(2) Cornell Law Review 391

[15] Li-ann Thio, Chapter 5 'Constitutionalism in Illiberal Polities' in *Oxford Handbook on Comparative Constitutionalism*, Andras Sajo & Michel Rosenfeld eds., (Oxford University Press, 2012) 133-152; Graham Walker, 'The Idea of Nonliberal Constitutionalism' in Ian Shapiro and Will Kymlicka (eds), *Ethnicity and Group Rights* (NYU Press 1997) 154-184.

[16] 'A team of experts to draft S'pore Charter', *Straits Times* (Singapore), 11 September 1965.

colonial powers, with the negotiated agreement of local leaders, was that the city-state should find a place as part of the Federation of Malaysia, which Singapore seceded from on 9 August 1965.[17] This does not mean that Singapore does not have ideals, though this is somewhat muted rather than trumpeted in a constitutional preamble or directive principles.

Two key features should be observed in understanding constitutional development and the direction of constitutionalism in Singapore.

First, Singapore has enjoyed a long uninterrupted period of political stability and has not experienced political turnover since Independence. It has a dominant party state[18] which today commands an overwhelming majority of 82 of 89 elective parliamentary seats. This means that the ruling People's Action Party (PAP) party may and has regularly amended the constitution which generally requires the support of a two-thirds parliamentary majority.[19] This has facilitated a spate of constitutional experiments.

Second, Singapore has presented an alternative law and development model centered around a strong state model which is able to undertake long-term planning and to implement unpopular policies, such as compulsory acquisition. The view, which has been dubbed the 'Asian values' school in certain quarters, is that in the early phase of a nation's development, "too much stress on individual rights over the rights of the community will retard progress." Political stability as to be achieved through social discipline, by curtailing an over-robust exercise of civil and political rights; combined with a legal environment that protected contract and property rights, this was key to achieving economic take-off, which fueled Singapore's economic success from third to first world nation within a generation. [20]

Over time, with the emergence of new interests which need to be accommodated, which may result in "a looser, more complex and more differentiated political system."[21] This in fact is what has happened over time in Singapore, in terms of both political culture and institution-making which is meant to reflect some degree of (managed) political liberalisation, albeit not after the model of western

[17] This stemmed from deep political and economic disagreement between the ruling parties of Singapore and Malaysia, exacerbated by racial tensions between the Malay Majority in the Peninsula, and the Chinese majority in the city state. Singapore gained independence from Britain by joining the Federation on 16 September 1963.

[18] The PAP held all parliamentary seats between 1968-1981 when Singapore effectively had a one party state, primarily because of the weakness of the parliamentary opposition and their failure to contest and win electoral sins, until JB Jeyaretnam broke the PAP stranglehold by winning the Anson by-election in 1981.

[19] There have been about 50 Constitutional Amendment acts since independence. The governing provision is article 5 of the Constitution of the Republic of Singapore. More complex regimes in articles 5A, 5B and 5C

[20] For example, the gross GDP per capita from USD$500 in 1965 to USD$50,000 in 2011. K Shanmugam, 'The Rule of Law in Singapore' [2012] SJLS 357-365 at 358.

[21] Statement by Foreign Minister Wong Kan Seng, Vienna World Conference on Human Rights, 16 June 1993, Government Press Release 20/JUN09-1/93/06/16

liberal democracy. This may be described as a form of paternal (a relational term) democracy, as distinct from paternalism (a father knows best ideological mindset). This reflects the changing relationship between the Singapore government and the governed, reflected both in institutional developments and the rules of engagement. For example, while First Prime Minister Lee Kuan Yew was viewed as an authoritarian paterfamilias who ruled with an iron fist, Second Prime Minister Goh Cho Tong presented himself as an 'elder brother'[22] who sought to persuade rather than to impose *diktat.* Third Prime Minister Lee Hsien Loong, after suffering the electoral loss of a multi-member constituency in the 2011 General Elections, adopted the posture of public servant leadership, stressing that politicians were to serve their constituents, that there was no job security in politics, and emphasising popular consultation, catering to a more literate, wealthy and demanding citizenry.

The Singapore experience has demonstrated that economic reform and human development does not have to take place in tandem with political liberalisation after the Western 'ROCC' model. This successful economic track record earns the government a great deal of performance legitimacy, in tandem with democratic legitimacy from the ballot box.

II. Aversive Constitutionalism

1. Managing Race and Religion

Although the Singapore government is pragmatic in orientation, it is principled in various respects. This is evident in the strain of aversive constitutionalism evident in the rupture from the Malaysian approach that the Singapore constitutional order adopted, in addressing questions of race and religion in a different manner. It was recognised from the outset that "a nation based on one race, one language and one religion, (*Satu Bangsa, Satu Bahasa, Satu Ugama*) when its peoples are multi-racial, is one doomed for destruction." Having a "multi-racial secular society" was a "dire necessity" to ensure state survivability. [23]

The existing state Constitution of Singapore was retained with consequential amendments to reflect state independence; early plans to draw up a new constitution to entrench democratic practices and minority rights were abandoned.[24] Nonetheless, a 1966 constitutional commission was convened to propose adequate constitutional safeguards to secure the rights of racial, linguistic and religious

[22] Bertha Hanson, "PM Goh on his role as 'elder brother'" *The Straits Times* (20 October 1994) 4.

[23] Ministerial Statement, EW Barker, Minister for Law and National Development, 'Appointment of Constitution Commission' 24 Singapore Parliament Reports, 22 Dec 1965 at col 429.

[24] 'A team of experts to draft S'pore Charter', *Straits Times* (Singapore), 11 September 1965.

minorities.[25] Three points are noteworthy in appreciating religion-state relations and how the constitution deals with ethno-cultural diversity.[26]

First, Singapore practices a form of secular democracy. In opposition to the Malaysian confessional constitution,[27] the Singapore constitution makes no reference to any religion, there is no *invocation dei.* The Proclamation of Singapore of 9 August 1965 rests on the "inalienable right of a people to be free and independent", an expression of popular sovereignty and people-centric democracy. Article 152 of the Constitution enjoins the government to care for the interests of "racial and religious" minorities in Singapore, but does not recognize any minority rights or special privileges, distinct from Malaysia's preferential treatment of *bumiputeras* (sons of the soil) in terms of economic privileges. In particular, the government is to exercise its function in a manner which recognizes the "special position of the Malays" as indigenous people of Singapore. Pursuant to article 153, a degree of legal pluralism is recognised through the Administration of Muslim Law Act (Cap 3), which establishes an Islamic religious council, syariah courts and provides for religious law over a limited range of personal and customary law matters such as marriage, wills and halal certification. AMLA "reassures the Muslim community that its religion, Islam, and their Muslim way of life, have their rightful place in plural Singapore."[28] Religious courts are subject to the jurisdiction of civil courts, over the correct construction of statutes and in relation to procedural fairness.[29] AMLA is an exception to the generality of laws, a rule of law virtue, and underscores the importance of protecting pluralism in relation to the rights of ethnic and religious minorities.

Second, unlike the Malaysian Constitution which defines as 'Malay' someone who practices the Muslim religion under article 160, the Singapore Constitution does not ascribe a religion to any person based on their ethnicity,[30] even if 99.4% of Malays are Muslim.

Third, the Singapore Constitution adopts more liberal religious freedom guarantees. Article 15 protects the rights of every person to 'profess, practice and propagate' their religion; the Malaysian ban against religious propagation to Muslims was explicitly rejected by the 1966 constitutional

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[25] Li-ann Thio, 'The Passage of a Generation: Revisiting the 1966 Constitutional Commission' in *The Evolution of a Revolution: 40 Years of the Singapore Constitution* (Routledge-Cavendish, 2009), Li-ann Thio & Kevin YL Tan eds., 7-49.

[26] Li-ann Thio, Constitutional Accommodation of the Rights of Ethnic and Religious Minorities in Plural Democracies: Lessons and Cautionary Tales from South-East Asia (2010) 22 Pace International Law Review 43-101

[27] Article 3 of the Federal Constitution of Malaysia recognizes Islam as the religion of the federation. While historic intent indicates that Malaysia was meant to be a secular state, there have been political and judicial contests with respect to whether 'Islam' is a public law value: see generally Joseph M Fernando, *The Making of the Malayan Constitution* (MBRAS Monograph No. 31, 2002).

[28] Zainul Abidin Rasheed, Senior Minister of State (Foreign Affairs) 85 Singapore Parliament Report, Administration of Muslim Law (Amendment) Bill, 17 Nov 2008 at col 741

[29] *Mohd Ismail bin Ibrahim v Mohd Taha bin Ibrahim* [2004] 4 SLR 756

[30] Article 160 of the Federal Malaysian Constitution provides

commission as being incompatible with a secular democracy.[31] Neither does Singapore have any apostasy or blasphemy laws, as religious offences related not to the truth of a religious belief, but the use of religion to stir feelings of enmity, hatred, ill-will and hostility between different religious groups which harms the public order and the quasi-constitutional value of 'racial and religious harmony', which transcends public order to relating to the qualitative relationship between groups and how this affects the broader national solidarity.

There are diverse varieties of 'secularisms', and the form of the secular state in Singapore is anti-theocratic, not anti-theistic: individuals with religious convictions have the equal right with those of irreligious convictions to engage in public debate over law and policy matters. [32] The Court of Appeal has described the Singapore model as one of 'accommodative secularism'[33] while a leading minister has termed it "secularism with a soul", a system under which religion is not denigrated or marginalized but "allowed to play its role in forging a harmonious and cohesive society in our Singapore"[34] which is the world's most religiously diverse country.[35]

A strict separationist model is not practiced, as is clear from the interaction between religion and state in certain respects, such as the co-operative partnership between the government and religious groups engaged in promoting social welfare, which exemplifies the role of religion as a 'constructive social force'. [36] Nonetheless, there is a certain wariness in relation to the mixing of 'religion' and 'politics', such as where religion is invoked in electoral rallies to influence voting or to inspire disaffection against the government under guise of propagating a religious belief. The Maintenance of Religious Harmony Act (MRHA) empowers the issuing of non-justiciable restraining orders to 'gag' religious leaders to prohibit them from orally addressing a congregation or publishing in religious publications without ministerial permission.

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[31] Para 38, Report of the Constitutional Commission (Singapore Government Printer, 1966); see 'The right to choose one's religion - by a padre' *Straits Times*, 9 March 1966 at p.6. (A Malay Christian priest stating it was possible to practice Malay customs without being a Muslim)

[32] Religion in the Public Sphere of Singapore: Wall of Division or Public Square' in *Religious Pluralism and Civil Society: A Comparative Analysis*, Bryan S Turner ed., (Oxford: Bardwell Press, 2008) 73-104

[33] *Nappalli Peter Williams v Institute of Technical Education* [1999] 2 SLR 569 at [28].

[34] Zainul Abidin Rasheed, Administration of Muslim Law (Amendment) Bill, 74 Singapore Parliament Debates 23 May 2002.

[35] The Pew Research Centre ranked Singapore first on the Religious Diversity Index in 2014). It stated that "About a third of Singapore's population is Buddhist (34%), while 18% are Christian, 16% are religiously unaffiliated, 14% are Muslim, 5% are Hindu and <1% are Jewish. The remainder of the population of 5 million people belongs to folk or traditional religions (2%) or to other religions considered as a group (10%)." Pew Research Center, "Global Religious Diversity", 4 April 2014 at http://www.pewforum.org/2014/04/04/global-religious-diversity/.

[36] Para 45, shared values white paper (Cmd 1 of 1991). See Thio Li-ann, 'The Cooperation of Religion and State in Singapore: A Compassionate Partnership in Service of Welfare (Fall 2009) 7(3) Review of Faith & International Affairs 33-45; Kuah-Pearce Khun Eng, 'The Politics of Religious Philanthropy - Buddhist Welfarism in Singapore' in *Religious Diversity and Civil Society: A Comparative Analysis*, Bryan S Turner ed., (Bardwell Press, 2008).

The fear or trauma caused by race riots in the 1950s and 1960s in Singapore and Malaya fuels the primary principle of maintaining religious and racial harmony, which is one of five shared values.[37]

III. Positive Project: 'regardless of race, language or religion, so as to achieve a democratic society'[38]

Singapore's founding fathers determined to have a multi-racial state based on meritocracy, eschewing preferential treatment and special rights. This is reflected in the 4 official languages in Singapore stipulated in Article 153A (Malay, Mandarin, Tamil and English). The dominant belief was that members of minorities would be protected by a general individual rights regime, as clamoring for "rights different from those or additional to those enjoyed by the majority" was thought to repudiate the "democratic principle of equal rights",[39] and might provoke ethnic chauvinism on the part of the Chinese majority

Nonetheless, to pacify minorities, particularly the Malay minorities who had *bumiputera* status in the Malaysian Federation, the 1966 Constitutional Commission proposed having a 'Council of State' with powers of legislative review, designed to ensure that aggrieved parties would have adequate opportunities to make representation before the enactment of legislation that was discriminatory against members of any racial, linguistic or religious. Eventually, this took the form of the Presidential Council of Minority Rights (PCMR), which was a diluted form of the original proposal insofar as it did not compose independent experts but included high ranking cabinet ministers; meetings were to be held in camera, not in public. The PCMR was to draw attention to any "differentiating measure"[40] in a bill, but rather than allowing a PCMR report to be made to Parliament before the second reading of a bill, which is the main forum for debate, a report is made just before the third reading. The president cannot assent to a bill if the PCMR is of the opinion it would containing a differentiating measures, unless the Bill is a money bill, relates to security or which the Prime Minister certifies as 'urgent.' Nonetheless, even if the PCMR submits an adverse report, this can be overridden by a motion for presenting the Bill to the President supported by a two-thirds parliamentary majority, which the

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[37] These shared values may be read like a quasi-constitutional preamble and include: Nation before community and society above self; Family as the basic unit of society; Regard and community support for the individual; Consensus instead of contention; Racial and religious harmony: (Shared Values white paper, CMD 1 of 1991, Singapore Parliament) at [52].

[38] Singapore Pledge (1965), authored by S Rajaratnam.

[39] S Rajaratnam, (Foreign Affairs Minister), Report of the Constitutional Commission, Singapore Parliamentary Debates Official Reports (16 March 19677) vol 25, cols 1353-1372.

[40] Article 68 provides that "differentiating measure" means any measure which is, or is likely in its practical application to be, disadvantageous to persons of any racial or religious community and not equally disadvantageous to persons of other such communities, either directly by prejudicing persons of that community or indirectly by giving advantage to persons of another community;

PAP today easily commands. Unsurprisingly, the PCMR has been criticized for being toothless, its main role being symbolic, to provide some psychological assurance to minorities.

The importance of symbols and the ideal of multi-racialism was also evident in the recommendations made in 2016 by a constitutional commission to the institution of the elected presidency (EP).[41] The EP was introduced in 1991, transforming the ceremonial office of the president as head of state to an elective one, vested with a range of 'veto' powers, primarily in relation to fiscal matters. The qualifications for EP candidate was so stringent there was a real fear that members of the Malay community in particular would not qualify, as candidates from the public sector had to hold high public office (CJ, AG, Minister, Speaker), or be CEOs of statutory boards or government companies, while candidates from the private sector had to be CEO of a company worth $500m shareholder equity. The 2016 constitutional commission noted that pre 1991, there was a constitutional convention where the presidency was rotated amongst the various ethnic communities at a time when the legislature selected the president, to underscore the unifying symbol of multi-racialism and proposed what became known as the 'reserved elections mechanism' (REM) under new article 19B, which was criticized as being at odds with meritocracy and was admittedly an "unpopular decision." [42] To ensure that minorities could become president, a presidential election would be reserved for a particular racial group if Singapore has not had a President from that group for five continuous terms (30 years). This operates as a 'failsafe' if minorities fail to be elected in open elections, a form of restrained interventionism designed not to regulate power but to shape mindsets and attitudes. The Prime Minister declared that having multi-racial presidents "is an important symbol of what Singapore stands for, and a declaration of what we aspire to be."[43]

The primacy of multi-racialism is also reflected in an earlier constitutional experiment to institutionalise multi-racial politics through the Group Representation Constituency, first introduced in 1988. It requires political parties to field multi-member teams with a stipulated minority member,[44] placing the focus on the team rather than the ethnic candidate, which a regime based on separate race-based rolls or reserved quotas would do (proposals which were rejected), signaling difference rather than community. Criticisms that the GRC scheme was used to stultify the election of opposition politicians were made, because opposition political parties were so weak they could not muster enough candidates to field a team for a GRC ward, or could not find a candidate of the requisite ethnic group. They thus focused on single member constituencies (SMC). PAP ministers were candid in stating that

[41] See generally Thio Li-ann, *The Presidency of Singapore* (Singapore Chronicles Project, Institute of Policy Studies, 2015)

[42] 'Will reserved election promote multiracialism', *Straits Times*, 3 Sept 2017.

[43] 'PM Lee spells out why he pushed for reserved election', *Straits Times* 30 Sept 2017

[44] However, if a GRC team loses its minority members, by-elections are not automatically required: s24(2A) Parliamentary Elections Act (Cap 218).

the GRC scheme served as 'political stabilisers' since the PAP won every GRC ward since its introduction in 1988, until 2011. Examined in context, the law only requires that there be 9 SMCs, which means that more than 80 parliamentary seats would be contested through GRCs. Unsurprisingly, the GRC scheme has been criticized as unfairly benefitting the incumbent as it tended towards dominant party rule.

However, this criticism has largely dissipated with the 2011 General Elections where the PAP government lost Aljunied GRC and with it, two cabinet ministers and a junior minister. The GRCs were thus a double edged sword since at one fell swoop, political parties could gain or lose 4-6 parliamentary seats. Nonetheless, the GRC scheme was designed to ensure that Parliament was always multi-racial in character, without stipulating specific quotas. Notably too, the government has always rejected proposals such as that of proportional representation,[45] which tends to benefit smaller parties and ethnic minorities, and generally may open the door to weak, coalition government. This is anathema to the Singapore government's vision of the strong developmentalist state which cannot afford to have its programmes and policies thwarted by a strong opposition party which might form the next government, which is the norm in the Westminster parliamentary system in the UK and other jurisdictions, but not Singapore.

IV. Strong State: Legitimacy and Control

At one stage, government ministers argued that a one party state was just as able as a two party state to secure democracy, given that a parliamentary opposition composed of "bums, opportunists and morons" [46] could endanger democracy. The rhetoric of the 1970s gave way to the candid observation in the 1990s that "the system we want is actually one-party and many small parties to keep us on our toes."[47] This reflects a realization on the part of the ruling party that there was a growing desire on the part of the citizenry for more active political participation and to see political rulers held to account.

In response, the government began to evolve a more consultative approach towards politics, engaging in dialogues with the public. Institutionally, to reflect the importance of political pluralism,

[45] "We didn't do the proportional representation way because we felt that would be bad for Singapore. It would result in political parties that are based on race or religion. It would encourage political leaders to champion the demands of their particular segment against the broader interests of Singapore. It would divide us rather than bringing us together, because to win in a proportional representation system, you've got to have your base." PM Lee Hsien Loong, 'Updating the Political System' *Straits Times* 28 Jan 2016

[46] S Rajaratnam, quoted in Chan Heng Chee, *The Politics of One Party Dominance: PAP at Grassroots* (Singapore University Press, 1976) at 228.

[47] 'PAP loss would be 'hard to contemplate given the grave consequences' *Straits Times*, 10 Dec 1992, 22.

the constitution was amended in 1984 and in 1990 to introduce two schemes of unelected parliamentarians with limited voting powers[48] which have been refined over time, with the ostensible purpose of ensuring that Parliament is never again solely populated by one political party.

In 1984, the Non-Constituency MP scheme was introduced to ensure "the representation in Parliament of a minimum number of Members from a political party or parties not forming the Government." Originally, the scheme was introduced by Prime Minister Lee Kuan Yew in the early 1980s as having three main goals: to sharpen the little used debating skills of younger MPs and require Ministers to justify their actions against contrasting ideas, which had grown dormant in a Parliament dominated by one party; to provide an outlet for allegations of government misfeasance and corruption to allay any sense this could be easily concealed and lastly, to educate voters on the limitations of what a parliamentary opposition could do in the local context. Originally, up to 6 NCMPs could be selected from the top 6 losing opposition politicians earning the largest voting shares (provided the threshold of a minimum 15% of votes from the contested wards was cleared). If 6 opposition politicians are elected, no NCMPs are offered, if 5, then 1 NCMP seat is offered, and so on. Although opposition politicians decried this scheme as tokenism and a sop to satisfy the voter's desire for parliamentary opposition (since the scheme guaranteed the presence of parliamentary opposition in perpetuity), they took up these 'second class' seats and the heightened public profile and parliamentary experience they offered.[49] Government ministers derisively referred to NCMPs as 'losers.'[50] However, the tone has changed in the post-deference era after the 2011 General Elections which saw the record post-independence high of 6 opposition politicians being directly voted into Parliament. In 2016, a constitutional amendment increased the number of NCMPs (from an original 6 to 9 to12), and they were to be vested with full voting powers, to take away charges of being second class parliamentarians. The reasoning was that NCMPs as the 'best losers' not only ensured opposition voices in Parliament in perpetuity, but they had "at least as much right to be in Parliament" as MPs elected by a party list under a proportional representation system, having earned the support of some in their electoral ward. The NCMP scheme was supposedly meant to "moderate the extreme outcomes" of a first-past-the-post system." The government now presents the scheme as one where the right 12 people "will be able to hold the Government to account... and then in the next election, they will win more".[51]

[48] They cannot vote on supply or constitutional amendment bills, for example.

[49] For example, Sylvia Lim was first a Non-Constituency MP after standing for election in the 2006 general elections and became a MP after her political party, the Workers Party, won the Aljunied GRC in the 2011 general elections.

[50] Minister Wong Kan Seng in responding to a proposal by NCMP Jeyaretnam on having an independent elections commission stated: ""It is absurd. I think we cannot be more democratic than we are now. We even allow a loser to be in Parliament and make speeches attacking the government. Where could you find such a democracy in other countries?" Tim Healy & Santha Oorjitham, Conflict in a City of Consent, *Asiaweek*, 30 Nov 2000

[51] 'Not wise to purposely let the opposition grow bigger, says PM' *Straits Times*, 6 April 2018

In 1990, the Nominated Member of Parliament (NMP) was introduced to create more opportunities for Singaporeans "to participate in actively shaping their future"[52] thus presenting the government as adopting a more consensual approach to governance, one receptive to alternative views and able to accommodate constructive dissent. NMPs were distinct from NCMPs, who are opposition politicians were out to advance their party agenda. NMPs were not allowed to belong to any political party; instead, a special select committee was to appoint 9 nominees who "shall be people who have rendered distinguished public service, or who have brought honor to the Republic, or who have distinguished themselves in the field of arts and letters, culture, the sciences, business, industry, the professions, social or community service or the labour movement."[53] In making their selection, the committee should have regard for the need for NMPs "to reflect as wide a range of independent and non-partisan views as possible." NMPs would bring their special expertise or distinct perspective to enrich parliamentary discussions, and would be drawn from people who had "good reasons" for not wanting to enter politics or look after a constituency, such as the under-represented group of women.[54]

Thus, some 21 non-elected parliamentarians have been built into the Singapore version of the Westminster parliamentary system, a response to the dominant party system and the desire to have some element of political pluralism in the House, with a contest of ideas in open argument being seen as a boon and something that legitimates the present scheme of government.

While this may provide alternative views in the legislative branch, it appears to assume an alternative government is not likely, in assuming a small parliamentary minority that does not exceed 12 opposition parliamentarians, after which the NCMP scheme will become redundant. Have unelected MPs appears to open the door to more political participation, favouring a consensualist style of governance, without serious political contestation. Even if the PAP is not returned to power, the NCMP scheme "ensures a stronger opposition presence in Parliament, so that if the government wins overwhelming, nationwide support, it will still have to argue for and defend its policies robustly."[55]

The prospect that the PAP government will not be returned to power is now contemplated by PAP ministers. This is reflected in the discourse about 'freak elections' which may bring into power a corrupt government with untrammeled power, able to access and spend Singapore's considerable economic reserves through imprudent, populist policies. This is possible in dominant party states where the Cabinet controls the parliamentary majority and effectively enjoys untrammeled power to advance its agenda, facing few or weak political impediments. To guard against the plundering of

[52] Presidential Opening Speech, "On Building Consensus" *Singapore Parliamentary Debates, Official Record*, 9 January 1989, col 15

[53] Fourth Schedule, Singapore Constitution.

[54] Goh Chok Tong, *Singapore Parliamentary Debates, Official Record*, 29 November 1991, col 695 on discussing the reasons for the introduction of the Constitution of the Republic of Singapore (Amendment No 2) Bill

[55] PM Lee Hsien Loong, 'Updating the political system', *Straits Times*, 28 Jan 2016.

national reserves, the decision was taken to create the institution of the elected presidency as a fiscal check through an intra-branch scheme of checks and balances in 1990. To enable the President to have the moral legitimacy to oppose the decision of the head of government, the Prime Minister, the elected President (EP) was to be directly elected by the people with his own popular mandate, creating a duallist democracy. Essentially, the EP would be able, in consultation with an unelected Council of Presidential Advisors (CPA), to withhold assent to supply bills and transactions which drew down on 'past reserves'[56]. However, this decision was subject to a counter-checking mechanism such that where, for example, the president refused assent to a supply bill contrary to CPA recommendations, a two-thirds parliamentary majority vote could 'neutralise' the presidential 'veto' as presidential assent is deemed to be given from the date that parliamentary resolution is passed.

In inception, the EP scheme was thus a prudential measure instituted at a time "while honest men are still in charge"[57] to correct a "flaw in the political system" which future unscrupulous governments could exploit, it being a "fatal naivety" to bank on there being a "good and honest" government in perpetuity.[58] The parliamentary opposition maintained that a robust parliamentary opposition could better curb the arbitrary powers of Minister, and, in tandem with the courts as the final arbiter in disputes, furnish "a better safeguard than a one-man Elected President."[59] This indigenization of the Westminster model and its implementation of the separation of powers principle within the executive branch was a departure from the view expressed in the shared values white paper that governors were honourable and trustworthy, like Confucian junzi ("君子"). This government authored paper asserted that this idea "fits us better than the Western idea that a government should be given as limited powers as possible, and should always be treated with suspicion unless proven otherwise." This is distinct from the "liberalism of fear" [60] in western liberal constitutions which fuels the imperative of constructing schemes to restrain governments and legislatures. The EP scheme thus seems motivated by the Humean view that all men are self-interested knaves rather than Madison angels,[61] given that it was designed to be a check against cabinet government in certain stipulated matters.

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[56] Past reserves means reserves (the excess of assets over liabilities) not accumulated by the Government during its current term of office: Arts 2, 142.

[57] *Singapore Parliament Debates, Official Report* (4 October 1990) "Constitution of the Republic of Singapore (Amendment No 3) Bill" vol 56 at col 462 (Goh Chok Tong, First Deputy Prime Minister).

[58] *Singapore Parliament Debates, Official Report* (4 October 1990) "Constitution of the Republic of Singapore (Amendment No 3) Bill" vol 56 at col 462 (Goh Chok Tong, First Deputy Prime Minister).

[59] Lee Siew Choh, 56 SPR 4 Oct 1990, col 459, at 491.

[60] Judith Shklar, *Political Thought and Political Thinkers*, Stanley Hoffman ed (1998), p.3.

[61] If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. Federalist No. 51

This caused a problem as the president as ceremonial head of state was meant to be a unifying symbol, but making the office elective, with reactive executive powers, introduced the divisiveness of politics. The qualifications to run as EP were particularly stringent, not only requiring financial and/or managerial experience either from holding high public office or the being the CEO of a company with a minimum shareholders' equity of $500million. In addition, each candidate needs to be certified by the Presidential Elections Committee as "a person of integrity, good character and reputation."[62] To alleviate this tension between the historic unifying role and the new constitutional role of the EP, the government endorsed the constitutional commission's vision of presidential elections as being qualitatively different from General Elections and set about to manage this through rules governing election campaigns[63] to preserve "the dignity" associated with the presidency, allowing the EP to function as symbol of national unity, above tribal politics, personifying the People. Since the EP played no role in policy formulation, there was no need for a "vigorous contest of ideas" akin to what takes place during parliamentary elections.[64] The commission doubted the need for presidential rallies which could inflame emotions and precipitate divisiveness; televised addresses were considered more suitable. A new form was made available during the 2017 elections whereby candidates could voluntarily undertake to conduct their campaigns in such a "dignified" manner. In this way, the depoliticizing intent of rules governing elections was meant to mitigate tensions between the President's historical and custodial functions, a product of mixing in disparate functions in one institution.

V. Constitutional Development and Jurisprudence and the Influence of Political Culture

Distinctive features in relation to Singapore's political culture such as that of the governor as honourable man or *junzi* shape constitutional jurisprudence, as well as the view that the role of the media which is not supposed to be adversarial but constructive, as there was "no room in our political context for the media to engage in investigative journalism which carries with it a political agenda." Responsible, fair reporting was advocated as "our local political culture places a heavy emphasis on honesty and integrity in public discourse on matters of public interest."[65] Indeed, one of the reasons for enacting the Prevention of Online Falsehood and Manipulation Act (POFMA)[66] in 2019 was an

[62] Article 19(2)(e), Singapore Constitution.

[63] 2016 White Paper, paras 144-148.

[64] CCR, 7.11.

[65] *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [272]

[66] POFMA operates through tools like correction orders requiring a person communicating falsehood to put up a notice stating what was communicated was false or to correct the falsehood, for example.

appreciation that misinformation undermined democracy, and a desire to maintain honest debate "on what should be the way forward" on "a foundation of truth, foundation of honour and foundation where we keep the lies out."[67] Nonetheless, "the first…line of defence…is a well-informed and discerning citizenry,"[68] which signals to citizenship that what is normative in public debate is not only civility but discernment, underscoring the importance of both character and rationality in seeking the common good.

The idea of 'honour' and a 'deference society' is evident in the Singapore law on political defamation. Singapore rejects the 'public figure' doctrine articulated in *New York Times v Sullivan*[69] and *Lingens v Austria*[70] which requires a public figure to be thick-skinned, given the importance attributed to robust political debate and the discounting of reputational rights. Singapore courts have held it would be contrary to the equal protection of the law to treat public and private persons differently; however, it would seem that men who seek public office must, as "sensitive and honourable men", be adequately protected lest they refrain from engaging in politics, noting that defamation law "protects the public reputation of public men as well."[71]

The presumption of trusting government leaders may account for the heavy weightage accorded to their reputational rights. A *junzi* is a noble and moral person who leads by example. As such reputation is highly prized and theorized as a form of honour, characteristic of a "deference society".[72] Belinda Ang J in *Lee Hsien Loong v. Singapore Democratic Party*[73] noted that defamation law "presumes the good reputation of the plaintiff", quoting the Greek rhetorician, Isocrates, who noted that "the stronger a man's desire to persuade his hearers, the more zealously will he strive to be honourable and to have the esteem of his fellow-citizens."[74] Thus, "the good reputation of an individual (meaning, his character), is of utmost importance to one's personal and professional life for human proclivity is such that people are apt to listen to those whom they trust."[75] This is reflected in

67 K Shanmugam, Debate on POFMA Bill, 8 May 2019 (Parliament: fake news law passed after 2 days of debate, *Straits Times*, 8 May 2019)

68 Parliament: fake news law passed after 2 days of debate, *Straits Times*, 8 May 2019 (Communication and Information Ministers S Iswaran)

69 376 US 254 (1964) (US Supreme Court)

70 (1986) 8 EHRR 407 at [42].

71 *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 1 SLR(R) 791 at [62].

72 Robert C. Post, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 Cal. L. Rev. 691 at 702.

73 [2009] 1 S.L.R.(R.) 642 at para. 102 (H.C.).

74 *Ibid*.

75 *Ibid*. No reference was made to the government's view that governors were honourable men, or Confucian *junzi*, to develop a theory of reputation as honour, which frames a deferential society.

the greater quantum of damages awarded to politicians and public leaders, at the apex of the fourfold tier set forth by the Court of Appeal in *Lim Eng Hock Peter v. Lin Jian Wei:*[76]

Top Tier	Political leaders, where defamation causes injury to both personal reputation as well as the institutional reputation of government
Second Tier	Non-political public leaders who are public figures in business, industry and the professions where the relevant outputs serve to augment public welfare; higher damages accrue because of their higher social standing and devotion to public service
Third Tier	Prominent figures such as businessmen who are not national leaders or involved in public affairs, where the business does not serve the public welfare; nonetheless, professionals should get a higher award because of the damage done to their professional reputations
Fourth Tier	Private individuals

While public leaders could be strongly criticised for "incompetence, insensitivity, ignorance and any number of other human frailties" as opposed to attacks besmirching "their integrity, honesty, honour, and such other qualities that make up the reputation of a person".[77] Effectively, reputational concerns were treated as having constitutional status as a co-equal right, balanced against free speech interests. Higher damages are awarded presumably to vindicate public reputation and to sustain the moral authority of governors, such that a private person enjoys weaker protection in this instance than a public person.

A hierarchical view of society is also manifest in the discount given in deciding the quantum for damages in *Lee Hsien Loong v Roy Ngerng Yi Ling*[78] where the defendant ran a private blog[79] commenting on Singapore politics, in the course of which he published an article defaming the Prime Minister, for which he was found guilty. The defendant invoked what might be identified as the spectre of the Confucian *Xiaoren* (little or petty person who cannot transcend his personal concerns and prejudices), stating that he should be subject to smaller damages as he was a "defamer of low credence" who would be less likely to be believed, which would lessen the gravity of the accusation, given his lower standing.[80] Given the defendant's "comparatively low standing", he was awarded a "substantial

76 [2010] 4 S.L.R. 357 (C.A.) 1. This drew a distinction between public leaders, both in the public and private sector as distinct from people famous in the public eye, who promoted the public welfare, the reputation of professional men and finally that of ordinary individuals.

77 *Lim Eng Hock Peter v Lin Jian Wei* [2010] 4 SLR 357 at [13].

78 [2015] SGHC 320

79 The court indicated that an institutional blog like that belonging to a news outlet or a traditional newspaper will be more credible than a run of a mill blog: *Lee Hsien Loong v Roy Ngerng* [2015] SGHC 320 at [55]

80 Reference was made to *Goh Chok Tong v Chee Soon Ju*an (2005) where the prominent standing of the defendant was a relevant factor. This was also the approach taken by the Hong Kong Court of Final Appeal in *Oriental Daily Publisher Ltd v Ming Pao Holdings Ltd* [2012] HKCFA 59, cited at [2015] SGHC 320 at [33]-[34]

reduction" in the quantification of damages, about half the sum awarded to those who defamed the Prime Minister during the last 20 years.[81] This cultural worldview thus shapes the contours of political speech and competing interests.

VI. Judicial Review (neither American or European, Singaporean) - Coequal

While judicial review on grounds of constitutionality is a power that Singapore courts have asserted, the courts have never struck down a piece of legislation as being unconstitutional. When it comes to morally controversial issues, for example, the courts have refused to construe 'personal liberty' or the 'equality' clause expansively to encompass new rights, such as claims to 'sexual autonomy'; this flows from the co-equality of branches of government and the separation of powers. Courts refrain from acting as second legislative chamber and refuse to arrogate legislative power to themselves or to consider extra-legal factors; where the courts "make" law, this is "only permissible in the context of the interpretation of statutes and the development of the principles of common law and equity,"[82] which the legislature can reject. The court is both to display judicial modesty and judicial courage, as warranted.[83]

While Singapore retains the British model of law where it comes to regulating commercial transactions, there has been a distinct move towards autochthony in the public law field. In 1994, Singapore cut off ties with the Privy Council as the highest court of appeal for the ostensible reason that the Singapore legal system had attained a sufficient degree of investor confidence and did not need the 'safety net' of the Privy Council as a body immune from undue influence to review the judicial process. In addition, the government considered that continuing reliance on the Privy Council would stultify local legal developments as it was no longer cognizant of Singapore's distinct circumstances. The way was paved for the future development of an autochthonous public law as evident in a 1994 Practice Statement on Judicial Precedents[84] which provided that Singapore courts would depart sparingly from cases dealing with "contractual, propriety and other legal rights", given the need for legal certainty. However, in the field of public law, it was stated that legal developments should reflect the enormous political, social and economic changes in Singapore, as well as "the fundamental values of Singapore society." Since then, the courts have generally rejected English precedents which have been 'Europeanised', insofar as the influence of the jurisprudence of the

81 [2015] SGHC 320 at [116]

82 *Lim Meng Suang v AG* [2015] 1 SLR 26 at [77]

83 *Tan Seet Eng v AG* [2015] SGCA 59

84 Practice Statement (Judicial Precedent) [1994] 2 SLR 689, issued 11 July 1994

European Court of Human Rights has altered English law 'in a liberal direction'[85] by according greater weightage to rights.[86] In particularly, it has rejected proportionality review, deeming it a European import into English public law by way of the 2000 Human Rights Act, which England enacted to give effect to its obligations under the European Convention on Human Rights. This is an intrusive standard of review, which may require the court to substitute its own judgement for that of the proper authority. The purposeful subsuming by Singapore courts of proportionality review under irrationality review reflects a local sensitivity against juristocracy.

When it comes to interpreting fundamental liberties, judicial review should consider 'local conditions' which have at various times supported statist and more recently, communitarian readings of fundamental liberties. Indeed, mixed constitutionalism is evident in the case law. In *Nappalli v Institute of Technical Education*, the Court of Appeal gave a liberal reading of the article 15 religious liberty guarantee in stating that "the protection of freedom of religion under our Constitution is premised on removing restrictions to one's choice of religious belief."[87] Religious identity was voluntarist, rather than ascriptive.[88] In times past, statism was evident in the displacement of religious freedom considerations in favour of public order grounds in *Colin Chan v Public Prosecutor*.[89] Here, a ministerial order issuing a blanket ban on Jehovah Witnesses' publications under the Undesirable Publications Act was unconstitutional. The Jehovah's Witnesses had been deregistered under the Societies Act in 1972 as its pacifist tenets and refusal of its eligible members to perform compulsory military service was considered a security threat. Yong CJ fashioned a statist trump which had no textual basis in declaring that the "sovereignty, integrity and unity of Singapore" were the "paramount mandate" of the Constitution and "anything, including religious beliefs and practices, which tend to run counter to these objectives, must be restrained."[90]

Most recently, there is evidence of a calibrated, authentic balancing approach in *Vijaya Kumar v AG* [91] which sought to optimalise or accommodate competing interests. This concerned the constitutionality of conditions attached to the grant of a permit for a religious procession, to celebrate the Hindu festival of Thaipusam.[92] These conditions were challenged as violating religious liberty

[85] *AG v Wain (No 1)* [1991] SLR 373 at 393F-G.

[86] E.g. see *Yong Vui Kong v PP* [2010] 3 SLR 489 at [61] (pointing out that unlike various Caribbean state, the Singapore Bill of Rights was not modelled after the European Convention of Human Rights, and therefore case law influenced by Europe was not applicable in Singapore).

[87] *Nappalli v Institute of Technical Education* [1999] 2 SLR (R) 529 at [228]

[88] Unlike article 162 of the Malaysian Constitution which ascribed Islam to Malays, the basis for apostasy laws.

[89] [1994] 3 SLR 662

[90] [1994] 3 SLR 662 at 684F

[91] [2015] SGHC 244

[92] All public processions in Singapore need a police permit, which may come with conditions.

(article 15), being unreasonable in the *Wednesbury* sense for prohibiting musical accompaniment. The High Court considered the licence and conditions no unreasonable as it fell within public order considerations as playing music in public required police authorization under the Public Order Regulation (2009) which applied to all religious processes, given the due to communal sensitivities and the potential for communal disturbance and strife." The court referred to the history of communal riots in Singapore, global trends of rising religiosity and sensitivities. It noted that the police, who had expertise at the 'ground level' had placed close attention to relevant facts such as traffic congestion, crowd build up, the scale and duration of the procession and its religious nature, "about 9000 to 10,000 devotees carrying kavadis or milk pots along a route of about 3km." This procession lasted for more than 24 hours, and had thousands of supporters and spectators. Thus, the conditional permit was "clearly linked to legitimate public order considerations," based on police assessments of ground conditions in consultation with temple organisers, security providers, the traffic police, Land Transport Authority and the Hindu Endowments Board. The Court accepted the complex, polycentric nature of social policy and noted it was not the correct authority to adjudicate on these matters. It approved the "calibrated approach" to the use of music (which was permitted at certain stationary points) which indicated the police had paid "due regard" to article 15 rights. For an outright ban in 1973, the police had over the years made incremental adjustments and a less strict approach to the music policy to permit the singing of religious hymns and playing music at music points at certain hours, at a maximum of 65 decibels. In so doing, the court upheld a communitarian ethos which gave weight both to a religious minority and to the community at large.

VII. Relational Constitutionalism: Soft Law, Public Ritual and the CRI

A final distinctive feature of Singapore Constitutionalism is that the constitution is not only to set out institutions, powers and rights, a form of what might be termed relational constitutionalism is practiced,[93] to manage inter-religious disputes which causes social alienation. The goals of relational constitutionalism is to build and keep civil peace and social harmony within multicultural societies, to secure "the relational well-being of individuals and groups and to preserve sustainable relationships in a polity where disparate religious groups and their members are able to co-exist, maintain their distinct identities, while being unified by a national identity and a shared commitment to the common good."[94] This could be done by institutions and processes that promote dialogue and interaction, such

[93] Thio Li-ann, Singapore Relational Constitutionalism: The 'Living Institution' and the Project of Religious Harmony (2019) SJLS 72-102

[94] Li-ann Thio, "Relational Constitutionalism and the Management of Religious Disputes: The Singapore 'Secularism with a Soul' Model" (2012) 1:2 Oxford J L & Religion 446

as the Presidential Council for Religious Harmony which is , which is composed of both religious leaders and lay persons. [95] Exercises like religious leaders working together under the guidance of a government minister to draft a Declaration on Religious Harmony (2004) or the private initiative by the Inter-religious organization in issuing a Commitment to Safeguard Religious Harmony[96] facilitate the building of trust and friendly relations, which enhances relational welfare. These soft law documents have to be consistent with the Constitution and notably, the Commitment starts with affirming the constitutional guarantee of religious freedom.

While there are legal sanctions to deal with offences against religion in the Penal Code or the statutory crime of sedition[97] which in Singapore includes the unusual ground of "promoting feelings of ill-will and hostility between difference races or classes of the population of Singapore"[98], the government sometimes prefers an informal approach to handling inter-religious dispute. This periodically erupts in Singapore, where sermons or speeches are delivered, often transmitted online, which causes ill-will or hurt feelings. The government may give warnings to religious leaders who transgress 'soft constitutional law' norms[99] which are found in executive authored instruments and widely known. In Singapore, given the power and prestige of the executive, these instruments, though hortatory rather than mandatory in nature, have considerable influence as the framework for desirable conduct. They are continually referenced by public and private actors[100] and gain the weight of a form of 'precedent' which nurtures expectations. For example, the Maintenance of Religious Harmony white paper,[101] which may be seen as an authoritative guideline on how to exercise the religious

[95] Article 22I, Constitution of Singapore

[96] 'More than 250 religious organisations commit to safeguard religious harmony', *Straits Times*, 19 June 2019

[97] On sedition law in Singapore, see generally Tan Yock Lin, "Sedition and its New Clothes in Singapore" [2011] Sing JLS 212; Jaclyn L Neo, "Seditious in Singapore! Free Speech and the Offence of Promoting Ill-Will and Hostility between Different Racial Groups" [2011] Sing JLS 351–372; Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at pp 774–792.

[98] Religion is implicated because of the loose treatment of 'race' to involve 'religion', particularly where Malays are concerned as 99% of them profess Islam.

[99] Li-ann Thio, 'Soft Constitutional Law in non-liberal Asian Constitutional Democracies' (2010) 8(4) International Journal of Constitutional Law (ICON) 766-799.

[100] The Commitment to Safeguard Religious Harmony, a private initiative provides: "We will share and propagate our beliefs respectfully, paying attention to inter-faith and intra-faith sensitivities. We will ensure that our practices are also done in a respectful and sensitive manner. We will not denigrate or insult other faiths, or promote ill-will. We reject unequivocally and will never tolerate any form of violence against anyone, including because of his faith." Text available at https://www.ircc.sg/commitment

[101] "So long as all Singaporeans understand that they have to live and let live, and show respect and tolerance for other faiths, harmony should prevail. Religious groups should not exceed these limits, for example by denigrating other faiths, or by insensitively trying to convert those belonging to other religions. If they do, these other groups will feel attacked and threatened, and must respond by mobilising themselves to protect their interests, if necessary militantly. Similarly, if any religious group uses its religious authority to pursue secular political objectives, other religions too must follow suit": Maintenance of Religious Harmony white paper, (Cmd 21 of 1989), para 13.

freedom of practise and propagation, cautions against insensitive proselytizing. While religious propagation is a constitutional right under article 15, it must be exercised sensitively and in a non-denigrating fashion. Indeed, the imperative of maintaining 'racial and religious harmony', which speaks to a sense of solidarity and respect for ethnic and religious differences, may be considered a 'constitutional civil religion',[102] informing a capacious understanding of public order which transcends the absence of disorder to implicate the quality of relationships.

A 'public ritual' in the sense of expectations has developed out of certain incidences where Christians, Muslims and Taoists/Buddhists had a falling out over sermons that they found upsetting or which the government feared would cause disharmony. This entailed, with due media attention, the transgressing religious leader delivering an apology in person to the leaders of the religious communities, forgiveness, reconciliation, a declared commitment to work together to achieve religious harmony, sometimes followed by a fellowship meal and visits to each other's church, temple or mosque. After the dust has settled, the relevant government minister will affirm these private initiatives and reiterate the soft constitutional law of mutual respect, tolerance and non-denigration of other faiths. This is an aspect of the Constitution as 'living institution' and not merely the text or case law. Relational constitutionalism is appropriate when the goal is not sanction but reconciliation, an educative moment to reiterate what is considered anti-social behavior and exhortation to heal relational breaches rather than breed animus and vengeance which perpetuates divisive conflict. It broadens the vocabulary of constitutional discourse beyond rights in drawing in duty, trust, solidarity, a conciliatory rehabilitative ethos in service of sustainable relationships, as a strategy to manage divided societies. Furthermore, this brand of constitutionalism discharges an integrative function in facilitating the process by which citizens develop a distinct, collective identity in promoting a vision of citizenship and the common good which is oriented towards promoting multiculturalism, moral solidarity, a shared way of life and living.

VIII. Conclusion

The Singapore Constitution is a flexible constitution which has been driven down an autochthonous route, while maintaining certain universal principles like the separation of powers, rule of law, democracy and protecting the rights and interests of individuals and racial and religious minority groups. These are common aspirations across countries, although the method of realising these goals differ.

[102] Li-ann Thio, 'Irreducible plurality, indivisible unity: Singapore Relational Constitutionalism and cultivating harmony through constructing a constitutional civil religion' [2019] 16(3) German Law Journal 171-213

Key particular traits that define the Singapore experience include a strong commitment to the rule of law, in terms of facilitating a business environment and placing a premium on socio-political stability and order. A variant of communitarianism is the governing political philosophy, where the concerns of the individual, situated in society, are balanced against those of the various minority groups and the national community. Securing racial and religious harmony through building durable relationships is a priority. While institutional checks like the EP have been developed to curtail some aspects of cabinet government, and while there has been a liberalization in terms of facilitating political participation through schemes like the NCMP and NMP and a policy of consultation, Singapore remains a dominant party state where faith in political constitutionalism remains high, where there is increasing resort to judicial review and rights litigation, with the courts more willing to exercise a form of calibrated review in relation to the exercise of executive powers, which is an expression of legal constitutionalism. A 'principled pragmatism' is evident insofar as ideological dogma is eschewed and the constitution is seen as a flexible tool which future generations can adapt to meet their needs, anchored upon the fundamental principles of multi-racialism, religious freedom, secularism, social harmony, the sovereign right of the people to elect their government and laws which comport with society's norms of justice and fairness.

【Special Features: Multiple Aspects on Constitutionalism –Asian "Contexts" and its Logic】

Constitutionalism in ASEAN Region: Judicial Structure under the 2008 Constitution of the Republic of the Union of Myanmar

Khin Khin Oo*

Contents

I. Introduction

The Union of Burma regained her independence from British on 4 January 1948 with her first Constitution of the Union of Burma, 1947. The 1947 Constitution authorized the Supreme Court as Court of final appeal to exercise highest judicial power, and its decisions in all cases were final. The Supreme Court had authority to issue constitutional writs; to give an opinion upon an important question of law referred by the president, and to decide on constitutionality of any bill or law passed by the legislature. The second constitution of Constitution of the Socialist Republic of the Union of Burma became operative from 3 January 1974. Under this constitution, Council of People's Justice was the highest judicial organ of the country and it was subordinate and responsible to the Pyithu Hluttaw, single chamber legislature. Justice was administered collectively by each judicial organ. Under that constitution, the Pyithu Hluttaw had the sole power to interpret the Constitution and to

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decide the validity of the measures of the organs of State power. Military justice for members of the People's Defence Services was administered according to law by a collective organ or by a single judge. In 2008, Myanmar adopted the current Constitution of the Republic of the Union of Myanmar (2008). Among many significant changes found in this Constitution, there is a study on establishing a new composition of the country's courts under the judiciary chapter. As a novelty, not only the Union Supreme Court obtained responsibilities as the highest court of ordinary law, but also constitutionally recognized Courts - Martial for the military justice system and the standalone Constitutional Tribunal (hereinafter, CTU), came into existence. This paper presents and discusses constitutionally rooted courts' adjudication together with the conclusiveness of their judicial decisions.

II. Courts of the Union under the 2008 Constitution

The Constitution of the Republic of the Union of Myanmar (2008 Constitution) came into force on 31 January 2011. The judicial power is entrusted in the Supreme Court of the Union and its subordinate courts, in the Courts-Martial and the Constitutional Tribunal of the Union. Chapter VI of the Judiciary Chapter provides the basic structure of the judiciary from section 293 to section 336 of the Constitution.

Section 293 of the 2008 Constitution is the legal basis for the formation of Courts of Union. The three different courts systems, Supreme Court and its subordinate courts for civilian adjudication, Courts-Martial for military adjudication, and the Constitutional Tribunal for constitutional adjudication, stand separately and distinctly from one process to another, and judicial decisions passed by these courts are final and conclusive within their own jurisdiction. This paper will now briefly explain the functions and authorities of each court under respective adjudication at the union level of court under the 2008 Constitution.

1. Union Supreme Court and its Subordinate Courts

The Union has a Supreme Court. Without affecting the powers of the Constitutional Tribunal and the Courts - Martial, this Supreme Court is the highest court of the Union.[1]

Therefore, the Supreme Court is the highest court in the country to rule on civilian adjudication.[2] Section 295 of 2008 Constitution enumerates the original jurisdiction of the Supreme Court as follows:

[1] Section 294 of 2008 Constitution.

[2] The civilian adjudication generally refers to the process of decision-making for disputes between ordinary citizens who are not members of the military through some form of judgement. Adjudication produces final decision that the parties are obligated to respect. Civil offence means an offence which would be triable by a court of ordinary criminal justice in the Union of Myanmar under sections

(a) Only the Supreme Court of the Union has the following original jurisdiction:
  (i) in matters arising out of bilateral treaties concluded by the Union;
  (ii) in other disputes, except the Constitutional problems, between the Union Government and the Region or State Governments;
  (iii) in other disputes, except the Constitutional problems, among the Regions, among the States, between the Region and the State and between the Union Territory and the Region or the State;
  (iv) other matters as prescribed by any law.
(b) As the Supreme Court of the Union is the highest court of the Union, it is the court of final appeal.
(c) The judgments of the Supreme Court of the Union are final and conclusive and have no right of appeal.
(d) The Supreme Court of the Union, subject to any provision of the Constitution or any provision of other law, has the appellate jurisdiction to decide judgments passed by the High Courts of the Regions or the States. Moreover, the Supreme Court of the Union also has the appellate jurisdiction to decide judgments passed by the other courts in accord with the law.
(e) The Supreme Court of the Union has the revisional jurisdiction in accord with the law.

Moreover, the Supreme Court has the power to issue the writs of *Habeas Corpus*,[3] *Mandamus*,[4] Prohibition,[5] *Quo Warranto*[6] , and *Certiorari*[7] for granting fundamental rights of citizens under the Constitution.[8] In order to make writs application, the Law Relating to the Application of Writ was issued by *Pyidaungsu Hluttaw*.[9] There is the High Court of the Region in the region and the High

3 (e), (k) of Defence Services Act of 1959. Section 5 of the Penal Code also provides that nothing in the Penal Code affects any act for punishing defence services personnel.

[3] Writ of Habeas Corpus means a writ issued in writing after causing to bring the detainee to the office of writ and hearing whether or not the detention is in conformity with the law by any court of the Republic of the Union of Myanmar or any competent authority. Section 2(c) of Writ Law.

[4] Writ of Mandamus means a writ issued in writing to comply with law by any competent person; or any authority; or any government department for the failure to comply with the authority conferred thereon. Section 2 (d) of the Writ Law.

[5] Writ of Prohibition means a writ issued in writing not to perform beyond the jurisdiction (ultra vires) or against justice in any proceeding of any court or any quasi-judicial matter. Section 2 (e) of the Writ Law.

[6] Writ of Quo Warranto means a writ issued in writing whether or not it is in conformity with law after hearing whether or not any government department or any empowered authority has carried out in accord with laws, rules, regulations, by-laws, procedures, orders, notifications, directives issued on person or persons. Section 2 (f) of the Writ Law.

[7] Writ of Certiorari means a writ issued in writing to be the decision in conformity with Law if it is found that the decision of any Court or any quasi-judicial matter is not in conformity with Law. Section 2 (g) of Writ Law.

[8] Sections 296, 378 of 2008 Constitution.

[9] The Law Relating to the Application of Writ, Pyidaungsu Hluttaw Law No.24, 2014, will be hereinafter referred to as Writ Law.

Court of the State in the state. These courts have the authority to adjudicate on the original case, on appeal case, on revision case, and matters prescribed by any law. [10] Courts of the Self- Administered Division, Courts of the Self- Administered Zone, District Courts, Township Courts and other courts constituted by law are different levels of courts under the supervision of the High Court of the Region or State.[11]

The organization and formation of the Supreme Court, High Courts, and its subordinate courts are detailed by the Union Judiciary Law 2010.[12] Criminal Procedure Code defines criminal jurisdiction, and Civil Procedure Code defines the civil jurisdiction of these courts. These criminal and civil jurisdictions are supplemented by the orders and directives issued by the Union Supreme Court from time to time in order to meet the needs of the changing situation of the country. These are, however, not the subjects of this paper.

2. Courts - Martial

The courts-martial, the second type of court under section 293(b) of the 2008 Constitution, is for military justice.[13] The Defense Services in Myanmar is constitutionally recognized as a sole patriotic defense force that is strong, competent, and modern,[14] and it has the right to administer and adjudicate all affairs of the armed forces independently.[15] Accordingly, the Defense Services personnel are administered in accordance with the law [Defense Services Act of 1959] collectively or singly[16] , and section 343 (b) of the 2008 Constitution grants final decision-making power in military adjudication to Commander - in - Chief of the Defense Services. Military court proceedings are different from civilian adjudication because they are discipline-based. The general purpose of military adjudication is to promote justice and to assist in maintaining good order and discipline in the armed forces. Martial Law ought to be distinguished from civilian judicial work in both substance and procedure. The Defense Services Act of 1959 (hereinafter, 1959 Act), and its Rules are the special criminal law for

[10] Sections 305, 306 of 2008 Constitution.

[11] Section 314 of 2008 Constitution.

[12] The Union Judiciary Law came into force on 28 October 2010 as SPDC Law No 20/ 2010.

[13] Military justice is distinct from martial law, which is the imposition of military authority on a civilian population as a substitute for civil authority, and is often declared in times of emergency, war, or civil unrest. Most countries restrict circumstances, namely when and in what manner martial law may be declared and enforced.

[14] Section 20 (a) of 2008 Constitution.

[15] Section 20 (b) of 2008 Constitution.

[16] Section 343 (a) of 2008 Constitution.

those who are subjects of the Defense Services Act.[17] There are four types of courts-martial[18] under the 1959 Act. These courts are general courts-martial, district courts-martial; summary general courts-martial; and summary courts-martial.[19] Section 211 of 1959 Act provides for the procedures to be followed by the Courts- Martial Appeal Court. In connection with final saying of the decision passed by the Courts-Martial Appeal Court, section 217 of the same Act[20] provides as follows;

> Section 217
> 1. The Courts-Martial Appeal Court is the court of final appeal. In addition, no appeal shall lie against the decision of the Courts-Martial Appeal Court before any other court.
> 2. The Courts-Martial Appeal Court shall submit the decided appeal cases to the Commander-in-Chief of the Defense Services within 30 days from the date on which the decision was passed.
> 3. The Commander-in-Chief of the Defenses Services may, after scrutinizing the decision and the proceedings of the appeal submitted by the Courts-Martial Appeal Court, pass the order that the decision of the Courts-Martial Appeal Court has been confirmed, or that the decision of the Courts-Martial Appeal Court has been cancelled and the decision of the Courts-Martial has been reconfirmed, or that the appellant has been acquitted from the case or revise and order that the punishment passed by the Courts-Martial Appeal Court has been cancelled and such less punishment is to be served, or any other suitable order allowed by this Act may be passed. The decision of the Commander-in-Chief of the Defense Services is final and conclusive.

3. Constitutional Tribunal of the Union

Constitutional adjudication mainly deals with constitutional issues, such as questions of interpretation of the constitution, decisions on the constitutionality of the federal and state laws, and constitutional controversies between the federation and the federal states or among the federal states, and some other prescribed matters[21] depending on the constitution of a country. Myanmar is the second common law country having a separate constitutional court after Constitutional Court of Republic of South Africa. Constitutional courts[22] are a feature of civil law countries, and the choice

[17] Section 2 of 1959 Act defines the following persons are subjects to this Act wherever they may be, namely: officers of the Defense Services; persons enrolled under this Act; persons who were subject to the Burma Army Act, or the Burma Naval Discipline Act, 1947, or the Burma Air Force (Discipline) Act, 1947, immediately before the commencement of this Act; and persons not otherwise subject to military law, who, on active service, in camp, on the march, or at any frontier post specified by the President by notification in this behalf, are employed by, or are in the service of, or are followers of, or accompany any portion of, the Defense Services. Every person subject to this Act under sub-section (1), clause (a), (b) or (c) shall remain so subject until his services are terminated or he is duly retired, discharged, removed, dismissed, or cashiered from the service.

[18] Court-martial is a court-martial held under Defense Services Act. Section 3 (i) of 1959 Act.

[19] Section 110 of 1959 Act.

[20] Section 38 of the Law Amending the Defense Service Act 1959.

[21] Such as impeachment of president, dissolution of political parties, individual constitutional complaints.

[22] Constitutional systems in which the function of judicial review is concentrated in a specialized constitutional court outside the

of a constitutional court was a departure from the common law norm. In Myanmar's constitutional system with democratic government, the constitutional adjudication is performed by the Constitutional Tribunal of the Union.[23]

Section 46 of the 2008 Constitution under the heading of Chapter I (Basic Principles of the Union) provide a mandate to establish the CTU. The CTU, accordingly, has the power to interpret the Constitution and to impose veto over the constitutionality of executive and legislative acts. It also has the authority to decide on the constitutional disputes between the Union and its units; or between the units; and on disputes relating to the rights and duties of the Union and its units arising when implementing legislation.[24] The CTU implements concrete judicial review under section 323 of the Constitution. When the ordinary court experiences issues questioning the constitutionality of a statute, such a court temporarily pauses the trial to request the Tribunal via the Supreme Court to examine the constitutionality of the issue. By using the authority entrusted by the Constitution in sections 336 and 443, the State Peace and Development Council enacted the Constitutional Tribunal of the Union Law[25] to prescribe the formation of the Tribunal and its duties and functions.

Only prescribed persons and organizations have *locus standi* before the CTU. The only persons who can submit specified constitutional matters directly to the CTU are the President; the Speaker of the Pyidaungsu Hluttaw; the Speaker of the Pyithu Hluttaw; the Speaker of the Amyotha Hluttaw; the Chief Justice of the Union; and the Chairperson of the UEC;[26] the Chief Minister of a Region or State; the Speaker of a Region or State Hluttaw ; the Chairperson of a Self-Administered Division Leading Body, or a Self-Administered Zone Leading Body; and a minimum of 10 percent of all representatives of the Pyithu Hluttaw or the Amyotha Hluttaw also have the collective right of access to the CTU in accordance with section 326 of 2008 Constitution.

III. Discussion

It is common for Myanmar constitutions to insert a finality clause that prohibited him or her from challenging the validity of the Supreme Court's judicial decisions as a last resort. Section 295 (c) of the 2008 Constitution provides for finality and conclusiveness of the judgments passed by the Union

ordinary judiciary are often classified as falling within the Austrian/European or Kelsenian model of judicial review. The famous Austrian scholar Hans Kelsen first introduced this model in the Austrian Constitution of 1920 which he helped to draft.

[23] The Constitutional Tribunal of the Union will hereinafter referred to be as CTU.

[24] Section 322 of 2008 Constitution.

[25] The Constitutional Tribunal of the Union Law came into force on 28 October 2010 as SPDC Law No 21/ 2010.

[26] Section 325 of 2008 Constitution.

Supreme Court.[27] The Supreme Court reaffirmed this in *Shin Moe Pyar vs. Union of Myanmar* case that "when a case was decided by the Union Supreme Court as a special appellate case under Union Judiciary Law, the appellant does not have another chance to apply Supreme Court to issue writs under the Writ Law."[28] The grounds for special appeal under Union Judiciary Law is, however, quite different from grounds for writs application either under the Writ Law or under the 2008 Constitution.[29]

The Supreme Court's authority to issue writs under the 2008 Constitution can be seen in the decision of *Daw Win Win Khaing vs. Dispute Settlement Arbitration Council & 2 case.*[30] It is stated that the applicant can make a writ application to Union Supreme Court for judicial remedy either for violation of fundamental rights granted by the Constitution under sections 377 and 378 of the 2008 Constitution or for issuance of different categories of a writ under section 296 of same Constitution. However, the decisions of the Supreme Court cannot be filed at the CTU for constitutional review. This is barred not only by section 295 (c) of finality and conclusiveness of the Supreme Court's decision but also by section 322 of limited functions and duties of CTU and by sections 325 and 326 of restricted accessibility of the CTU.

The military justice system has been now constitutionally separated from ordinary civilian adjudication,[31] and a new constitutional finality clause was introduced by sections 293 (b), 319, and 343 of the 2008 Constitution.[32] Sections 293 (b), 319, and 343 (a) of the 2008 Constitution provide for separate military justice adjudication for Defense Services personnel, and section 343 (b) [33] states for finality and conclusiveness of the decision passed by the Commander-in-Chief of the Defense Services. Therefore, it may be presumed that military personnel cannot file for or against decisions passed by

[27] The previous two constitutions also had similar provisions for the conclusiveness of the decisions passed by the highest court in the country. This constitutional provision section 295 (c) is supplemented by sections 18, 22 of Union Judiciary Law.

[28] *Shin Moe Pyar vs. Union of Myanmar, 2011 MLR 126.*

[29] Under section 20 of Union Judiciary Law, only if the Chief Justice of the Union considers that any problem on which action should be taken for the benefit of the public has arisen in any case finally adjudicated by the Supreme Court of the Union, he may cause the retrial of such problem by the special Appeal Court or by the Full Bench.

[30] *Daw Win Win Khaing vs. Dispute Settlement Arbitration Council & 2, 2015 MLR (SC) 245*.

[31] Section 28 of 1947 Constitution stated Parliament's law-making power for Defense Forces that "The Parliament may by law determine to what extent any of the rights guaranteed by this Chapter [Rights to Constitutional Remedy] shall be restricted or abrogated for the members of the Defence Forces or of the Forces charged with the maintenance of public order so as to ensure fulfilment of their duties and the maintenance of discipline." Section 99 of 1974 Constitution briefly provided separate and distinct military justice administration as "members of the People's Defense Services may be administered according to law [Defence Services Act of 1959] by a collective organ or by a single judge."

[32] All these provisions are provided under the heading of Courts-Martial.

[33] This constitutional provision was supplemented by amended section 217 of 1959 Act.

the Court Martial Appeal Court either as a special appeal case or as a civil miscellaneous case of writ application in the Supreme Court under the 2008 Constitution.

Previously, before the 2008 Constitution, Court Martial Appeal Court was composed of judges of the High Court, high ranking officers of the Defense Services, and other persons having legal experience and not being government officials.[34] The 1959 Act also allowed an appeal to the Supreme Court from the decision of the Court-Martial Appeal Court for some limited circumstances.[35] After amending the Defense Service Act of 1959 in 2010, however, Court Martial Appeal Court[36] and Commander-in-Chief of the Defense Services got increased authority in military adjudication. As a result, under the section 343 of the 2008 Constitution, finality and conclusiveness of decisions of Commander-in-Chief of the Defense Services makes impossible either for the Supreme Court to review the legality of such decision or for the CTU to review its constitutionality.

The Constitutional Tribunal of the Union of Myanmar was established by the 2008 Constitution with the new democratic government. Under the 2008 Myanmar Constitution, the Constitutional Tribunal has jurisdiction to interpret the Constitution, to impose veto over the constitutionality of laws by different Hluttaws and of executive acts by the Union, its Regions and States; to decide constitutional controversies between the Union and its Regions and States or between the Regions and States.[37] The Constitution does not grant the CTU the authority for constitutional complaints for violation of citizens' fundamental rights. Their remedy is writ proceedings at Supreme Court as mentioned above. On the other side, only prescribed persons and organizations have *locus standi* before the CTU.[38]

Section 324 of the 2008 Constitution mentions the finality clause for decisions passed by CTU. However, the finality and conclusiveness of the CTU's decision were questioned after the union level organization case in 2012.[39] In *President of the Union vs. The Speakers of the Pyidaungsu Hluttaw, Pyithu Hluttaw and Amyotha Hluttaw*, the question was if the Committees, Commissions and Bodies

[34] Section 211 of 1959 Act before amendment in 2010.

[35] Section 217 of 1959 Act before amendment in 2010.

[36] Now the composition of the Court Martial Appeal Court is of a military personnel only. Section 211 of 1959 Act after amendment in 2010.

[37] Section 322 of 2008 Constitution.

[38] The only persons who can access the CTU are the President; the Speaker of the Pyidaungsu Hluttaw; the Speaker of the Pyithu Hluttaw; the Speaker of the Amyotha Hluttaw; the Chief Justice of the Union; and the Chairperson of the UEC; the Chief Minister of a Region or State; the Speaker of a Region or State Hluttaw ; the Chairperson of a Self-Administered Division Leading Body, or a Self-Administered Zone Leading Body; and a minimum of 10 per cent of all representatives of the Pyithu Hluttaw or the Amyotha Hluttaw also have the collective right of access to the CTU. Section 326 of the 2008 Constitution.

[39] *The President of the Union vs. The Speakers of the Pyidaungsu Hluttaw, Pyithu Hluttaw and Amyotha Hluttaw, Submission No 1/2012 at Constitutional Tribunal of Union.*

formed by each Hluttaw was Union level organization or not. The CTU answered this question in the negative way. The parliamentarians were unhappy with Tribunal's decision and refused to accept it, rather, demanding the resignation of CTU's members. The members of the Tribunal collectively resigned on 6 September 2012. The Pyidaungsu Hluttaw subsequently declared that the interpretation of the CTU, in this case, was null and void *ab initio*[40] because the CTU's wrong interpretation of the constitution should not be treated as final and conclusive as section 324 of the 2008 Constitution provides.[41]

In this respect, although there is no connection between the CTU and Supreme Court under 2008 Constitution, the CTU made an application of writ of mandamus to the Supreme Court, [42] just before CTU justices resigned. This writ stated that the Parliament's actions were in violation with the constitution, and illegally interfered functions and duties of the CTU.[43] The Supreme Court, however, dismissed the CTU's submission on the ground that writ application made by CTU did not fall under any category of writ application to which the Court had jurisdiction.

IV. Conclusion

The judiciary is one of the three branches of the power which adjudicates upon conflicts between state institutions, between state and individual, and between individuals. The judiciary in any country is the custodian of the constitution and guarantor of the fundamental rights of the people. If the judicial system is just, impartial, and independent, the fundamental rights enshrined by the constitution can be preserved, and contribute to the rule of law in society. Under the 2008 Constitution, there are three constitutionally rooted courts; the Supreme Courts and its subordinate courts, the Courts-Martial, and the Constitutional Tribunal. While the former two courts exercise their original and appellate judicial powers under ordinary laws of the land, respectively, as apex courts within their jurisdiction, the latter court reviews the constitutionality of prescribed issues under the Constitution distinctly. It is suggested to consider, firstly, to adopt a coordinate judicial system between civilian courts and military courts at the court of last resort. Secondly, individuals whose fundamental rights were allegedly violated and

[40] To be treated this as invalid from the beginning.

[41] Meting minutes from Fifth Regular Meeting of First Pyidaungsu Hluttaw held on 31 October 2012, pp 129-131.

[42] *The President of the Union vs. The Speakers of the Pyidaungsu Hluttaw, Pyithu Hluttaw and Amyotha Hluttaw, Submission No 1/2012 at Constitutional Tribunal of Union.*

[43] *The Constitutional Tribunal of Union vs. Pyidaungsu Hluttaw, Pyithu Hluttaw, & Amyotha Hluttaw (Civil Miscellaneous Case No 115/2012 dated 7 Sep 2012).*

who exhaust available judicial remedies, must have standing to bring their claims before the Constitutional Tribunal.

【Special Features: Multiple Aspects on Constitutionalism –Asian "Contexts" and its Logic】

Constitutionalism and State-Building in Post-Soviet Eurasia

PARTLETT William*

Abstract

In Europe, Latin America, and Asia, new written constitutions have emerged as foundational instruments for breaking with centralized, authoritarian governance and constructing effective and just forms of constitutional government. Yet, despite textual commitments to overcome the Soviet past in new post-Soviet Eurasian constitutions, transformative constitutionalism remains unrealised in many of the former Soviet republics. With the exception of the Baltic states, most have rejected transformative constitutionalism and instead have built centralized super-presidential systems. Underpinning this authoritarian resilience is a deeply-rooted discourse that views centralism as the best strategy for post-Soviet state-building. To be successful, advocates of constitutionalism must show how it offers a better path to effective state-building than centralism.

Contents

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I. Introduction

Post-Soviet Eurasia comprises 15 nations that became independent in late 1991 with the disintegration of the Soviet Union. These countries span from the west of Ukraine to the Russian Far East and were once part of the Soviet Union and, before that, the Russian empire. To differing extents, these countries share a common history dating back to the Tsarist Russian Empire. The core or interior part of the Russian Empire included Moscow and the surrounding area.[1] To the east, it later extended across the Ural mountains and Siberia to the Pacific Ocean. On the western periphery it included the modern-day Baltic countries of Estonia, Lithuania, and Latvia as well as Ukraine, Belarus, and Moldova.[2] On the south-eastern periphery are the five modern-day countries of Central Asia and the Russian Far East.[3] And, finally, the south-western peripheries of the Russian Empire include the modern-day countries of the Caucasus: Armenia, Azerbaijan, and Georgia.[4]

This region shares a deeply-rooted tradition of viewing centralism and statism as critical to its state-building goal of constructing a "strong state" (*sil'noe gosudarstvo*). Both Tsarist and Soviet political discourse consistently argued that the centralization of power in a single leader (the Tsar or the leader of the Communist Party) and the prioritization of state interests over the interests of the individual were the best way to achieve a strong state and its developmental goals. This "centralized state discourse" is grounded in the dominant historiography of the region, which views centralized statism as critical for overcoming the particular historical challenges that the region faces.[5]

With the collapse of the Soviet Union, however, written constitutions appeared to be drafted to overcome this centralized state discourse. All of the post-Soviet constitutions contain foundational norms committed to individual rights and the separation of powers. For instance, Chapter 1 of Russia's 1993 Constitution declares that "the individual and his rights and freedoms" have the "highest value" (Article 2) in a constitutional order grounded on "ideological and

[1] Leonid Gorizontov, 'The "Great Circle" of Interior Russia: Representations of the Imperial Center in the Nineteenth and Early Twentieth Centuries' in Jane Burbank, Mark von Hagen and Anatolyi Remnev, *Russian Empire: Space, People, Power, 1700–1930* (Indiana University Press 2007) 90.

[2] Edward Thaden, *Russia's Western Borderlands, 1710–1870* (Princeton University Press 1984).

[3] Richard A Pierce, *Russian Central Asia, 1867–1917: A Study in Colonial Rule* (University of California Press 1960).

[4] Ronald Grigor Suny, 'Constructing Primordialism: Old History for New Nations' (2001) 73 *The Journal of Modern History* 862, 873 (discussing how national consciousness was not particularly well developed in the Caucausus).

[5] William Partlett, Post-Soviet Constitution-Making, pp. 545-551 in H. Lerner & D. Landau, Comparative Constitution Making (describing how the statist school of historiography views the unique challenges of the region requiring a centralized and therefore strong state); Tsygankov, The Strong State in Russia.

political pluralism" (Article 13).[6] In addition, the new post-Soviet constitutions include long lists of rights.[7] For instance, Chapter 3 of the Constitution of Azerbaijan lists a number of individual rights, including the right to freedom of speech, movement, conscience as well as the right to life, housing, and a pension. The Azerbaijan Constitution further explicitly states that rights can only be limited to the extent that this limitation is "proportional" to state interests.[8]

Yet, despite these textual commitments, these new constitutional orders have yielded a diversity of commitments to the use of a constitution to transform politics. In three post-Soviet Baltic states (Estonia, Latvia, and Lithuania), these new constitutional orders have successfully yielded a powerful break with the past, helping to create resilient and strong systems of democratic constitutionalism and rights protections.[9] The Baltic countries have therefore successfully used their new constitutions as "an enterprise of inducing large-scale social change through nonviolent political processes grounded in law."[10] They are therefore neglected examples of the "transformative constitutionalism" underway in South Africa, Germany, India, and Colombia.[11]

In other remaining Soviet republics, however, the project of implementing these textual commitments to transformation has been less successful. Underlying much of this resistance is the idea that constitutionalism—and its restrictions on state power—are unable to ensure a strong state. First, in some parts of the former Soviet Union (Tajikistan, Turkmenistan, Azerbaijan, and Uzbekistan), constitutions have done nothing to interrupt the practice of centralized, authoritarian politics. In Uzbekistan, for instance, the constitution's provisions on individual rights remain largely unimplemented by a Constitutional Court that has issued less than 30 decisions over the course of 27 years.[12] Second, in other parts (Russia, Kazakhstan, Belarus), political power has been centralized in the office of the president and constitutional courts have deferred to the state in enforcing individual rights in the face of federal legislation. For instance, the Russian Constitutional Court has cautiously exercised constitutional review

[6] Constitution of the Russian Federation. 1993. Official version available at: http://constitution.kremlin.ru/.

[7] Constitution of Turkmenistan 1992, art 63.

[8] Azerbaijan Constitution, art 71.

[9] Eivend Smith, The Constitution as an Instrument of Change (2003).

[10] Karl Klare, Legal Culture and Transformative Constitutionalism, Legal Culture and Transformative Constitutionalism (1998).

[11] Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia 21 (Daniel Maldonado, ed. 2014); Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 13 AM J. OF COMP. L. 527 (2017) (describing how the term applies in Germany's post-authoritarian transition).

[12] http://www.iconnectblog.com/2019/10/late-soviet-constitutional-supervision-a-model-for-central-asian-constitutional-review/

but has largely upheld federal legislation strengthening authoritarian governance on the basis of reflecting Russia's unique tradition.[13] Finally, in the remaining parts of the former Soviet Union (Armenia, Ukraine, Georgia, Moldova, and Kyrgyzstan), pluralistic politics has not translated into a serious commitment to use constitutional law to transform politics.[14] For instance, in Moldova, the Constitutional Court was recently used by a corrupt political group to block the rise of an opposition coalition government.[15]

Strong Constitutionalism	**Instrumental/contested**	**Weak**	**Sham**
Estonia, Latvia, Lithuania (3)	Moldova, Ukraine, Kyrgyzstan, Armenia, Georgia (5)	Russia, Kazakhstan, (2)	Tajikistan, Uzbekistan, Azerbaijan, Belarus, Turkmenistan (5)

The success of transformative constitutionalism in these non-Baltic parts of post-Soviet Eurasia requires linking the implementation of the foundational constitutional values in Eurasian constitutions with the construction of a strong state. Almost thirty years of centralism in much of the post-Soviet space has not yielded a strong state; on the contrary, it has fostered corruption, overly personalized leadership, and institutional weakness.[16] Constitutionalism offers a better path to building strong institutions and effective legal control. In fact, constitutionalism is not a project of limiting state power; it is a project that aims at building a strong and effective state.[17] This is certainly the case with German, Colombian, and South African transformative constitutionalism, where constitutionalism has placed obligations on the state to act in the construction of a stable, effective, and just state. By linking the implementation of its textual commitments to constitutionalism with a strong state, advocates of constitutionalism can work within their own constitutional orders to build stronger and more effective states.

[13] Arman Mazmyan, *The Judicialization of Politics: The Post-Soviet Way*, 13 INT'L J. CON. L. 200 (2015) (describing how post-Soviet courts have generally acted in the interests of the dominant group in power); Alexei Trochev, Judging Russia: Constitutional Court in Russian Politics, 1990-2006 (2008). William Partlett, The Contested Nature of Russian Constitutional Review, available at http://www.iconnectblog.com/2019/02/russias-contested-constitutional-review/.

[14] Maria Popova, Political Competition as an Obstacle to Political Competition, Comparative Political Studies (2010).

[15] See, e.g. Moldova: http://www.iconnectblog.com/2019/07/why-political-pluralism-is-not-enough-moldovas-constitutional-crisis/

[16] See, e.g. Barbara Geddes, Joseph Wright, and Erica Frantz, How Dictatorships Work (2018) (arguing that personalized dictatorships are less stable); Erica Frantz, Authoritarianism: What Everyone Needs to Know (2018).

[17] Nick Barber, Principles of Constitutionalism

II. Explaining this Diversity: Constitutionalism and State-building

What is driving these differing outcomes? The answer lies in the differing approaches to state-building in the post-Soviet space. In the early 1990s, all of the newly independent countries urgently needed to build effective and legitimate forms of political authority in the wake of the collapse of one-party, communist led governance. In fact, the collapse of communism unleashed a serious crisis of state capacity in the region.[18] A central question for the fate of constitutionalism in these fifteen post-Soviet state-building projects therefore was whether the particular challenges of state-building required abandoning centralized state discourse? Or did these challenges require the continued embrace of this approach?

1. The Baltic States: Strong Constitutionalism

Since the collapse of the Soviet Union, the three Baltic states have embarked on a state-building project that has rejected centralism. This state-building project has instead placed the construction of democratic constitutionalism at its center. This project was strongly underpinned by the central goal of Baltic state-building: to join the European Union.

This state-building goal has contributed to a powerful engagement with European and German transformative constitutionalism. In all three countries, a broad, principle-based approach has been taken to interpreting the constitution that is heavily influenced by the ECHR and the German Constitutional Court.[19] For instance, a 1994 decision Estonian Supreme Court decision stated that "the general principles of law developed by the institutions of the Council of Europe and the European Union should be considered" in declaring statutes unconstitutional.[20] At the same time, the Baltic courts have looked to one another to further develop their own particular version of transformative and strong-state constitutionalism. One clear example is the development of a positive constitutional right to health care in the Lithuanian context.[21] For instance, in 2005, the Court held that the state is constitutionally obliged to render social assistance to a person whose health is impaired as a result of improper, unsafe and unhealthy working conditions (including accidents at work and occupational diseases).[22]

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[18] V I Ganev, Post-Communism as an Episode of State-Building: A Reversed Tillyan Perspective, Communist and Post-Communist Studies (2005).

[19] See the three chapters outlining the powers of the court.

[20] (217, Uno Lohmus). Decision No III-4/A-5/94. 30 September 1994,

[21] The Lithuanian Constitutional Court has been particularly influential in this context. The Influence of the Rulings of the Constitutional Court on the Development of Health Law in Lithuania

[22] 7 February 2005 decision of the Lithuanian Constitutional Court.

2. The Eurasian Core: Weak and Sham Constitutionalism Amidst Continued Embrace of Centralism

The six post-Soviet countries in the Eurasian core have embarked on state-building projects that are very different than the Baltic states. These countries have reemphasized the importance of centralism and statism for a strong and independent state identity. Underpinning these state-building projects is a national tradition and identity that values centralism and personalized power. These state-building projects have therefore ultimately ignored the foundational norms in the constitution in favor of continuing this tradition.

(1) Example 1: Russia's Weak Constitutionalism

From the early period, Russia's state-building project has emphasized the importance of centralism to post-Soviet state building. Initially, under Yeltsin, centralism was justified as an expedient by President Yeltsin and his team as necessary for the creation of a market economy and to overcome the Soviet past.[23] Later, under President Vladimir Putin, centralism has increasingly been justified as the natural reflection of Russia's particular identity. For instance, in 2000, President Vladimir Putin wrote that "[t]he institutions and structures of our state (*gosudarstvo*) have long played a particularly important role in the life of our country and people. For Russians a strong state is not an anomaly, or something that should be struggled against. Quite the contrary, Russians see it as a source and guarantor of order, and the initiator and main driving force of any change." This strong state has been linked to a system of personalized and centralized power. More recently, Vladislav Surkov—an influential Kremlin ideologist—discussed Putin's centralized state as a long-standing Russian approach to governance that is grounded on a relationship between the people and the powerful leader and which will ensure Russia's powerful position in the world.[24]

This centralizing state-building project underpins Russia's super-presidential constitutional design.[25] It has also been used to justify the Russian Constitutional Court's deference to the state in individual rights cases.[26] Finally, the Russian Constitutional Court has translated these

[23] William Partlett & M. Krasnov, *Russia's Non-Transformative Constitutional Founding*, 15 European Constitutional Law Review 644 (2019).

[24] Vladislav Surkov, Dolgoe Gosudarstvo Putina (Putin's Eternal State), Nezavisimaya Gazeta, available at http://www.ng.ru/ideas/2019-02-11/5_7503_surkov.html. See also Andrei Tsygankov, The Strong State in Russia: Development and Crisis (2014).

[25] William Partlett, Super-Presidentialism (under review for publication).

[26] Sergei Belov. Russian Constiuttional Values in the Text and Practice of Interpretation. 131 Sravnitel'noe konstitusionnoe obozrenie No. 4 (2019). Pp. 68-83.

identarian arguments into the doctrine of the Court itself. In particular, the RCC has adopted a constitutional identity doctrine as a way of resisting key aspects of international human rights law. Underlying this approach is that international legal decisions cannot override Russian constitutional identity. The Chairman of the Russian Constitutional Court has developed this as a way of asserting Russia's statist history.[27] Pointing to the importance of the state, the Chairman of the Russian Constitutional Court, Valery Zorkin, has stated that "the Constitutional Court, should take into account the 'rich experience of collectivism' as opposed to the 'liberal-individualistic version of legal understanding' of the West 'as a person's freedom, limited only by the freedom of another person.'"[28]

(2) Example 2: Uzbekistan's Sham Constitutionalism

Uzbekistan has even more strongly linked its state-building project with centralism. In 1992, Uzbekistan achieved independence and became the first post-Soviet republic to adopt a written constitution. Since then, Uzbek state intellectuals have constructed an "Ideology of National Independence" to legitimate ongoing centralist governance.[29] This ideology locates Uzbek identity in the identity of unity and therefore concludes that a centralized and personalized state is a "natural and uncontroversial" reflection of this part of Uzbek history.[30]

The "naturalness" of centralism for Uzbek governance has been used to legitimate a super-presidential design that concentrates vast formal power in the office of the presidency. This centralism has undermined the implementation of the written constitution's list of rights as well as calls for democracy. Furthermore, it has undermined the success of the Uzbek Constitutional Court—as well as other institutions of constitutional control—in implementing the transformative aspects of the Constitution. Most notably, the constitution's provisions on individual rights remain largely unimplemented by an Uzbek Constitutional Court that has issued less than 30 decisions over the course of 27 years.[31] As a result, the written constitution (and court) has done little to transform Uzbek political life.

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[27] Anna Pushkarskaya, "Valery Zorkin Promises a New Globalization," 4 December 2017, available at https://www.kommersant.ru/doc/3486576.

[28] Anna Pushkarskaya, "Valery Zorkin Promises a New Globalization," 4 December 2017, available at https://www.kommersant.ru/doc/3486576.

[29] (March at 212).

[30] March at 221.

[31] http://www.iconnectblog.com/2019/10/late-soviet-constitutional-supervision-a-model-for-central-asian-constitutional-review/

3. The Hybrid Periphery: Contestation and Instrumental Constitutionalism

In the five remaining post-Soviet states, state-building strategy remains contested. In these countries, national identity remains highly contested: Is the identity of the country European? Or Eurasian? This contested identity is frequently the subject of ordinary political contestation as different political parties represent competing identities. For instance, in Moldova, the Party of Socialists is pushing for a more centralized approach to power that harkens back to Soviet-era identity and centralism; the ACUM party, by contrast, advocates a more European identity for Moldova.

This competition has undermined constitutionalism and encouraged the strategic manipulation of bodies of constitutional implementation such as courts. For instance, constitutional courts in these countries have intervened in highly political moments on behalf of powerful interests and without real basis in the text of the constitution. This reflects the fact that political interests facing defeat will do anything to avoid the loss of power, including placing "strategic pressure" on the courts. Alexei Trochev explains that, in these kinds of regimes, political uncertainty "forces rivals to focus on winning at all costs in the immediate future, because losing a battle now might mean losing the whole war." [32]

A good example is Ukraine, where the Constitutional Court has also become an instrument of political partisanship. The most obvious case involved a series of constitutional amendments passed in 2004 in the wake of the Orange Revolution that weakened the power of the Presidency and strengthened the Parliament. Although they were made in violation of the constitution, the constitutional court took no action for seven years. [33] In 2011, however, the Ukrainian Constitutional Court struck down these 2004 constitutional amendments under heavy pressure from a newly elected President: Viktor Yanukovych. [34] This decision effectively enhanced President Yanukovych's powers and weakened his opponents' powers.

In recent years, however, political revolutions in all five countries have created openings for a serious engagement with the democratic constitutionalism. For instance, in Armenia, after large-scale protests linked to the corrupt regime of Sargis Sargsyan, a new Prime Minister (Nikolai Pashinyan) has come to power calling for new approach. Pashinyan has sought to

[32] Alexei Trochev, Meddling with Justice, 18 Demokratizatsiya 122, 125 (2010).

[33] Venice Commission, Opinion on the Procedure of Amending the Constitution of Ukraine (October 2004) (expressing deep concern about the lack of involvement by the Constitutional Court in the amending process). Available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282004%29030-e.

[34] Ekaterina Mishina, *The Difficult Destiny of the Ukrainian Constitution*, available at http://imrussia.org/en/rule-of-law/698-the-difficult-destiny-of-the-ukrainian-constitution; Alexei Trochev, *A Constitution of Convenience in Ukraine*, JURIST - Forum, Jan. 18, 2011, http://jurist.org/forum/2010/11/a-constitution-of-convenience-in-ukrain e.php.

change the traditional centralized approach to political power. Even more recently, the newly elected of Ukraine President Zelensky has begun the process of trying to reform the Ukrainian courts (including the constitutional court), an aspect of Ukraine that has proven difficult to reform in the years since the Maidan revolution of 2014. [35]

A key part of this success of these movements is to link this project with the creation of a strong and effective state. In fact, rampant state capture and corruption has seriously weakened state capacity; constitutionalism offers an important part of the solution. This project therefore must link this with the idea that constitutionalism is about more than just limiting the state; it is also about creating a strong and effective constitutional order.

III. Conclusion: How to Kick-start or Support these Constitutional Movements

This analysis provides a critical lesson for those interested in advancing the project of post-Soviet Eurasian constitutionalism. The region has long been focused on the need for a strong state to cope with particular challenges. The necessity of a strong state was particularly pressing after the collapse of the Soviet Union. Constitutionalists must seek to break the link between centralism and a strong state; they then must seek to link constitutionalism with a strong state. This requires a two-fold strategy.

First, they must demonstrate how persistent (and formally unconstitutional) centralism and statist governance undermines a strong state by leading to personalized leadership and fostering deep-seated corruption and weakening institutions. [36] The ineffectiveness of centralism in state-building has become increasingly clear in recent years. For instance, in 2010, in Kyrgyzstan, after a significant corruption scandal, then-President Bakaev was pushed out and super-presidentialism was replaced with a new balanced checks-and-balances semi-presidential constitution. [37] More recently, in Moldova, a pragmatic coalition recently came to power in order to overcome massive corruption. This new coalition came to power in the wake of a major constitutional crisis precipitated in part by the constitutional court, which had been captured by the corrupt pre-existing leadership. [38] The victory of this new coalition included the resignation of the entire Constitutional Court.

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[35] https://www.ecfr.eu/publications/summary/guarding_the_guardians_ukraine_security_and_judicial_reforms_under_zelensky

[36] See, e.g. Barbara Geddes, Joseph Wright, and Erica Frantz, How Dictatorships Work (2018) (arguing that centralized and personalized leadership are less stable and weaken state capacity).

[37] http://constpalata.kg/en/about/istoriya/

[38] https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)012-e (discussing the problematic decisions made by the Constitutional Court).

Second, proponents of constitutionalism should then argue that the better approach for building strong states in the post-Soviet region is to adopt constitutionalism. Underpinning this argument is increasing evidence that constitutionalism does more than place limitations on state power; instead, constitutionalism is actually a project actively engaged in the creation of a strong state.[39] Recent comparative experience from all over the world—including countries with significant problems of poverty—suggests that constitutionalism is "an enterprise of inducing large-scale social change through nonviolent political processes grounded in law."[40] In this context, constitutional courts or other institutions of constitutional control have played a leading role in ensuring that the state becomes an instruments in ensuring a more just political order.[41]

Taken together, this analysis therefore suggests that the project of implementing the textual commitments in Eurasian constitutions is not a project of convergence with western models or values. Much as the project of transformative constitutionalism has taken different forms in Colombia and South Africa, constitutionalism will differ across the post-Soviet space. Understood this way, constitutionalism is an ongoing project squarely aimed at overcoming the particular problems of state weakness that continue to plague the development of individual countries. It therefore offers a far more promising path to the long-term state-building goal of a strong state than the traditional ideas of centralism and statism.

[39] Nick Barber, The Principles of Constitutionalism.

[40] Karl Klare, Legal Culture and Transformative Constitutionalism, Legal Culture and Transformative Constitutionalism (1998).

[41] They are, of course, not the only institutions that are necessary for this. See Eivind Smith, The Constitution as an Instrument of Change (1993) (discussing the role of the president, ombudsman, the media, and parliament in also upholding constitutional justice). For representative examples among many, see, e.g., Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 Wash U. Global Stud. L. Rev. 1, 67 (2009) (discussing a "a global shift to check representative institutions with increasingly broad principles of good governance."); Helen Stacy, Human Rights for the 21st Century—Sovereignty, Civil Society, Culture (2009) (looking at Colombia, India, and South Africa courts as powerful guardians of judicially protected human rights).

【Special Features: Multiple Aspects on Constitutionalism –Asian "Contexts" and its Logic】

Revision of International Law by the Constitutional Court of Russia: Between National and International Law

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Abstract

For the past few years, the relationship between the Russian Constitutional Court and the European Court of Human Rights (ECHR) has been most acute. Tension between these two courts arose about seven years ago in 2013 after the ECHR effectively denied a decision of the Constitutional Court of Russia in the case of Constantine Markin. The Constitutional Court subsequently refused to recognize the decision of the ECHR in this case. In the future, the right of the Constitutional Court not to recognize such decisions if they are deemed as contrary to the national Constitution was further amended by the Law on the Constitutional Court.[1]

However, a new wave of interest in the relationship between national and international law and constitutional principles has emerged just recently. On January 15, 2020, in a speech to the Russian Parliament, President Vladimir Putin proposed to amend the current Constitution of 1993 and formalize the priority of national law over international law.[2] On July 1, 2020, a popular referendum was held, at which the amendments proposed by the President were adopted. According to these amendments, the Constitutional Court has the right to disqualify decision of international courts (to allow the government not to execute it on the territory of the Russian Federation) if it contradicts the Constitution of Russia and its main principles.

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[1] Federal Constitutional Law N 7-FKZ "On Amendments to the Federal Constitutional Law" On the Constitutional Court of the Russian Federation " Entered into force on December 14, 2015. A new version of this law is currently in force: Federal Constitutional Law N 5-FKZ "On Amendments to the Federal Constitutional Law" On the Constitutional Court of the Russian Federation " Entered into force on November 9, 2020.

[2] https://www.washingtonpost.com/world/europe/putin-proposes-strengthening-parliament-even-while-keeping-his-own-powers-intact/2020/01/15/695eac6a-36e5-11ea-a1ff-c48c1d59a4a1_story.html

Contents

I. Introduction

On January 15, 2020, in his speech to the Russian Parliament, President Putin proposed to amend the current Constitution and formalize the priority of national law over international law. Despite the fact that such a proposal of the President was perceived negatively by the Russian legal community, [3] however, already on March 11 the Russian Parliament accepted the proposal and on March 14th President Putin signed it."[4] Two days later, at the request of President Putin, the Constitutional Court of Russia issued an opinion on whether the said law complies with the provisions of the current Constitution of 1993.[5] In particular, the Court decides that the said amendment does not imply a refusal of the Russian Federation from national treaties and fulfillment of its international obligations. In the Court's opinion, the new provisions of the Constitution are not aimed at refusing to comply with international treaties and decisions of interstate jurisdictional bodies based on them. However, the priority of the Constitution of Russia and its principles make it possible to find new ways of executing "controversial" decisions, which are supposed to be optimal for all participants. [6]

The Russian Federation joined the Council of Europe in 1996 and assumed its obligations to democratize and liberalize law in Russia, to protect human rights and freedoms, and to proclaim the rule of law. [7] Council of Europe duties included the requirement to comply with the requirements of

[3] For example, a huge number of discussions mainly condemning the amendments could be observed on social networks.

[4] Official website of draft laws https://sozd.duma.gov.ru/bill/885214-7

[5] Constitutional Court Opinion No 1-3. March 16, 2020 http://doc.ksrf.ru/decision/KSRFDecision459904.pdf

[6] Par. 3.3 of Constitutional Court Opinion No 1-3. March 16, 2020

[7] Federal law No. 54-FZ, «On the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols to them: 'The Russian Federation in accordance with Article 46 of the Convention recognizes ipso facto and without

a supranational judicial body. Admittedly, decisions of the ECHR have indeed played a positive role. For example, the law on compensation for delays in trials was adopted only after the number of cases in the ECHR from Russian applicants with such claims exceeded one thousand. The Constitutional Court itself, until 2011, often used links on decisions of the ECHR as additional arguments to its position. The concept of "dignity of the person," which is present in the Constitution of Russia, has also been filled in many ways with meaning and content thanks to the practice of the ECHR.[8] Moreover, the Constitution of the Russian Federation, adopted by popular referendum on 12 December 1993, contains many positions on human rights taken verbatim from the ECHR and the main documents of the United Nations.

However, after joining the Council of Europe, the largest number of complaints of violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms began to come from Russia. For a long time, the ECHR scolded Russia for its poor work in respecting human rights and freedoms, but there was no open confrontation. With the emergence of the case "Konstantin Markin v. Russia," the differences between the ECHR and the Constitutional Court turned into open confrontation.

II. The Russian Constitution and International Law

As mentioned above, one of President Putin's recent proposals[9] concerns a change in approach to international law. Under Article 15 of the Constitution: «The universally recognized principles and norms of international law and international treaties of the Russian Federation are an integral part of its legal system. If an international treaty of the Russian Federation establishes rules other than those provided for by its domestic law, then the rules of the international treaty will apply».

In other words, following this general principle, international treaties prevail over Russian laws. This is already a lot, but not enough, to recognize the absolute primacy of international law over national law. International agreements prevail over national laws, but not over the 1993 Constitution and special constitutional laws. Eventually, international treaties must be ratified in accordance with the federal law on international treaties in an appropriate manner. Consequently, the Russian Constitution, although sufficiently open to international law, does not explicitly provide for the transfer of part of its sovereignty to inter-state organizations.

special agreement the compulsory jurisdiction of the European Court of Human Rights concerning the interpretation and application of the Convention and its Protocols in cases of alleged violation by the Russian Federation».

[8] Article 21 of the Constitution: "The dignity of the individual shall be protected by the State. Nothing can be the basis for his diminution. "

[9] http://kremlin.ru/events/president/news/62617 (access date 03.03.2021)

Article 15 in chapter 1 of the Constitution is unchanged. In order to amend this Article, it is necessary to follow a rather complex procedure, to convene a special body - the Constitutional Council - and to adopt a new Constitution. The changes proposed by President Putin did not concern Article 15, but Article 79 of the Constitution. In the previous edition of Article 79, it was said that the Russian Federation can participate in international treaties if this does not contradict the principles and norms of the Constitution of Russia, and also does not violate the rights and freedoms of citizens and other persons. In the new edition, the legislator added a requirement according to which decisions of international bodies cannot be executed if they are adopted on the basis of an international treaty, in which Russia is one of the parties, but contradicts the Constitution. The Russian Constitutional Court is responsible for interpreting the act of an international body for its conformity with the Constitution.

III. The Case of *Konstantin Markin v. Russia*

The case *Konstantin Markin v. Russia* is a stumbling block between the Russian Constitutional Court and the ECtHR.[10] Konstantin Markin served under contract in the Russian Armed Forces. He asked the command of the military unit in which he served to grant him leave to care for his child until the child reached the age of three. After his divorce from his wife, Markin was left alone with three children, the youngest of whom was under three years old.[11] He was granted three months leave. This order was subsequently cancelled by military command due to the absence of documents confirming the right to receive leave. The grounds for refusing parental leave were that under the federal law on the status of military personnel, such leave could be granted only to women. This law says nothing about men. Markin filed a complaint with the Constitutional Court, in which he stated that the law on the status of military personnel was discriminatory and placed men and women in an unequal position.

In 2009, the Constitutional Court rejected Markin's claims, concluding that the legislator had the right to restrict rights and freedoms[12] of employees who perform constitutionally significant functions. The Constitutional Court concluded that such restrictions and differential treatment were justified because otherwise military personnel would not be able to perform their duties. In other words, the Court considered that if every male soldier had such a right, it could lead to disorganization in the army.

Markin appealed the case to the ECtHR, which ruled in 2012, finding violations of Article 8 (the right to one’s family life) and Article 14 (discrimination) of the ECHR. The ECtHR openly criticized

[10] ECtHR, Konstantin Markin v. Russia, No. 30078/06 (Oct. 7, 2010)

[11] According to other unofficial reports, he continued to live with his wife, but for some reason he needed such a long vacation.

[12] Decision of the Constitutional Court of the Russian Federation of January 15, 2009 No. 187-O-O http://doc.ksrf.ru/decision/KSRFDecision18793.pdf (access date 01.17.2020)

the Constitutional Court for injustice and its failure to properly test the balance of competing interests between maintaining the effectiveness of the army and protecting military personnel from discrimination in their family lives. ECtHR said: "The refusal of men on military parental leave when women are entitled to such leave is not justified". The ECtHR pointed to the evolution of modern society and to the equal participation of men and women in child care. The ECtHR recognized that some exceptions could be made against military personnel for the sake of national security, but these exceptions should not be discriminatory.

This decision of the ECtHR caused a negative reaction both in the Constitutional Court itself and among Russian politicians. For example, the Chairman of the Constitutional Court of Russia Valeriy Zor'kin quite strongly criticized the position of the ECtHR, noting that before *Markin's case* the ECtHR never questioned the approach of the Constitutional Court, at that time the Constitutional Court regularly used the practice of the ECtHR in its work. Every decision of the ECtHR is not only a legal but also a political act. "When such decisions are taken to benefit human rights in our country, Russia will always strictly implement them. But when the decisions of the Strasbourg Court are doubtful from the point of view of the essence of the European Convention itself, and even more directly affect national sovereignty, fundamental constitutional principles, Russia has the right to develop a defensive mechanism against such decompressions. Namely, it is through the prism of the constitution that the problem of correlation of decisions of the Russian Constitutional Court and the European Court must be solved. ".[13] The decision came to be seen as a direct challenge to the Constitutional Court by the ECHR. ECtHR was accused of showing contempt for the Supreme Judicial Authority of Russia.[14] Officially, the Constitutional Court continued to insist that there had been no violation of the Constitution of the Russian Federation on gender equality in the *Markin case*. The Constitutional Court also upheld earlier arguments on sovereignty, and discretion in the selection of national priorities.

However, the argument of a limiting on national sovereignty was somewhat far-fetched. One of the fundamental principles of democracy is respect for the supreme law of the country. Preferring a domestic constitution's supremacy over an international treaty may really just obscure a preference for a domestic court over an international tribunal (which is harder to control) as the final interpretive

[13] Valeriy Zor'kin, "Predel Ustupchivos'ti," Rossiiskaya gazeta - No. 5325 (246), October 29, 2010.

[14] Aksenova Marina, Marchuk Iryna. Reinventing or rediscovering international law? The Russian Constitutional Court's uneasy dialogue with the European Court of Human Rights //I•CON (2018), Vol. 16 No. 4, 1322–1346

authority. Even assuming a constitution's prioritization, how does one know when an international treaty contradicts domestic constitutional law? Such contradictions may not be obvious.[15]

Moreover, such conclusions of the Constitutional Court are not consistent because by ratifying the ECHR, the Russian Federation recognized the role of the ECtHR in interpreting the Convention. Thus, there is no *prima facie* (renunciation of state sovereignty) upon voluntary accession to the convention. Ratification of the treaty is an exercise of sovereignty. Therefore, it seems too late to argue that state power has "supremacy, steadfastness and self-sufficiency.". [16]

During the ratification of the Convention, Russia agreed to comply with the decisions of the ECtHR. Perhaps, when it was beneficial, the Russian government believed that the Convention was consistent with Russian constitutional law. However, subsequently, the evolutionary interpretation of the provisions of the ECHR led to a conflict between international law and the domestic legislation of Russia, which will be discussed later. However, this interpretation of the provisions of the Convention has always existed, and the Russian Federation should have been aware of the consequences of ratifying the ECHR. Article 32 of the ECHR provides that the jurisdiction of the ECtHR extends to all questions concerning the interpretation and application of the Convention. Article 46 provides that the parties undertake to comply with the final judgment of the Court in any case to which they are parties. At the same time, international law and treaties, based on it, provide an opportunity for states to communicate their other obligations, which may conflict with those imposed by an international agreement. The ECHR reserves the discretion or freedom of action of states to choose the best course of conduct and thereby strike a balance between their international obligations and their domestic obligations. For example, in the case of *OAO Yukos v. Russia*, such an obligation was the social obligations of the Russian government to its citizens. More details about this case will be discussed in a separate chapter.

However, interaction between supranational judicial organizations and national authorities is essentially a dialogue, as it usually involves some form of first or last assessment. The ECtHR usually assesses the situation of specific human rights guaranteed by the ECHR. National authorities may also enter into the dialogue when charged with enforcing the decisions of the ECtHR.[17] However, normal relationships between these two actors are only possible if each side respects the other. The state is supposed to effectively implement the decisions of an international body, and the international body

[15] Kahn J. The Relationship between the European Court of Human Rights and the Constitutional Court of the Russian Federation: Conflicting Conceptions of Sovereignty in Strasbourg and St Petersburg// The European Journal of International Law (2019) Vol. 30 no. 3. River 935.

[16] Ibid

[17] Aksenova Marina, Marchuk Iryna. Reinventing or rediscovering international law? The Russian Constitutional Court's uneasy dialogue with the European Court of Human Rights //I•CON (2018), Vol. 16 No. 4, 1322–1346.

in turn respects the right of the state to a constitutional identity as long as this identity do not engage in a strong confrontation with the ECtHR.

Tensions between the ECtHR and the Constitutional Court are permissible, since the ECtHR, following its own views, can interpret national legislation more broadly than the national Constitutional Court.

When an ECtHR decision conflicts with a country's national law, the ECtHR grants broad discretionary powers to the state, looking for suitable ways to implement the solution. In the end, the state must find a way to harmonize its domestic legislation with its international obligations, even if it does not like the decisions of the ECtHR. If the state-party does not bring its legislation in line with the decisions of the ECtHR, it would then violate the obligations to the Convention.

Let's turn again to the case of Konstantin Markin. He appealed to the District Military Court to review the original case on the basis of the decision of the ECtHR. The reviewing judge was presented two judicial decisions issued by the Constitutional Court in 2009, and the ECHR in 2012.

Not knowing how to proceed, the judge decided to suspend the case and appealed to the Constitutional Court for an explanation of what he perceived as an uncertain situation. The Constitutional Court expressed a clear position that the decision it had taken earlier was not subject to appeal[18]. The Court found no violations of the Constitution in Markin's case. Consequently, the Court's findings could not be questioned, and the lower courts had to follow the position of the Constitutional Court.

IV. The Case of *Anchugov and Gladkov v. Russia*

Even after a second decision was taken against Markin by the Constitutional Court, there was no serious confrontation between the Russian and international judicial bodies. The open conflict broke out as a result of the adoption by the ECtHR of a very controversial decision in the case *Anchugov and Gladkov v. Russia*.[19] Two citizens; Sergey Anchugov and Vladimir Gladkov were convicted of serious crimes, including murder, and served prison sentences. Anchugov and Gladkov appealed against the refusal of the election commission to allow them to participate in the parliamentary elections in 2003 and 2007 as voters. The Electoral Commission justified its refusal by norms establishing a constitutional ban on participation in elections for citizens serving sentences for criminal offences committed.

[18] Decision of the Constitutional Court of the Russian Federation of December 6, 2013 No. 27-P http://doc.ksrf.ru/decision/KSRFDecision147711.pdf (access date 01.17.2020)

[19] Anchugov and Gladkov v. Russian Federation, App. No. 11157/04 (ECtHR, July 4, 2013)

Under Article 32 of the Russian Constitution, citizens found by a court to be incapacitated, as well as those held in places of deprivation of liberty on the basis of a court sentence, are not entitled to vote or be elected to office. In other words, the Constitution establishes an absolute prohibition on certain categories of citizens from exercising electoral rights. Consequently, Anchugov and Gladkov were excluded from the voting on a reasonable basis in accordance with the provisions of the Constitution. The complainants claimed that the absolute prohibition against participating in the elections was excessive. They argued that they cared about the future of their country and would like to participate in the political life of society.

It is important to note that the ECtHR had previously held the position that convicts who had committed serious crimes such as murder could certainly be deprived of the right to vote.[20] However, the ECtHR accepted the complainants' arguments and found the absolute prohibition to be contrary to the ECHR. The Ministry of Justice of the Russian Federation asked the Constitutional Court to clarify whether it was legitimate to follow the ECtHR decision.

As a result, on 19 April 2016, the Constitutional Court published its decision confirming the right of the Russian Federation not to comply with the decisions of the ECtHR, which were contrary to the provisions of the Constitution of the Russian Federation.[21] The Court found that the decision of the ECtHR in the case of Anchugov and Gladkov could not be implemented, but it did not directly reject the decision of the ECtHR as long as it tried to implement a diplomatic approach. Also, the Court did not rule out on the introduction in the future of such an approach to punishments that would restrict freedom, but would not prevent a convicted from exercising mentioned rights.

The essence of the Court's decision was that there was an unconditional decree of the Constitution, which could not be canceled by the decision of the ECtHR. The article of the Constitution can only be changed by adopting a new Constitution. However, the Constitutional Court concluded that despite such a strict prohibition, the legislator could develop a differentiated approach to different groups of prisoners, for example, depending on the severity of the crime committed.

With regard to Anchugov and Gladkov, the Court decided that given the gravity of their crimes, they were justly deprived of the right to vote. Besides, it was also impossible to restore their rights, as the elections had already taken place and they would not have been able to vote anyway. Perhaps, in this case, the Russian Constitutional Court showed more diplomacy and restraint than the ECtHR. The Constitutional Court at least allowed the possibility that the legislator could in the future adopt an approach in which some prisoners could retain the right to vote. In turn, the ECtHR was unconditional

[20] Hirst v. Great Britain, App. No. 74025/01 (ECtHR, October 6, 2005)

[21] Decision of the Constitutional Court of the Russian Federation of April 19, 2016 No. 12-P http://doc.ksrf.ru/decision/KSRFDecision230222.pdf (access date 01.18.2020)

in its judgment. Why the ECtHR decided to fundamentally reconsider its past position remains unknown. The ECtHR itself in its decision did not explain why it changed its position.

V. The *Yukos Oil Company Case*

If in the case of Konstantin Markin the Russian Federation could explain its unwillingness to implement the decision of the ECtHR, and in the case of *Anchugov and Gladkov v. Russia* such a decision is quite reasonable, then in the case of the oil company Yukos everything is different. After the very controversial decision on the complaints of Yukos shareholders by the European Court of Human Rights, the relations between the ECtHR and the Constitutional Court of Russia went into open confrontation.

Even before the hearing at the end of 2018, the Constitutional Court adopted Resolution No. 21-P of July 14, 2015. According to this Resolution, the lower courts, when reconsidering the case after the ECtHR, can appeal to the Constitutional Court with the question of whether the decision of the ECtHR violates the provisions of the Constitution and thereby call into question the possibility of executing the decision of the ECHR. Thus, the Court had already then effectively called on the lower courts to question the decisions of the ECtHR and, if necessary, to seek clarification from the Constitutional Court.

In December 2015, a new chapter entitled "Consideration of cases on the possibility of implementing decisions of the inter-State body for the protection of human rights and freedoms" was added to the federal constitutional law on the Constitutional Court of the Russian Federation. It follows from the new provisions that a special state body (in this case, the Ministry of Justice of the Russian Federation) was given the opportunity to apply to the Constitutional Court of the Russian Federation for an explanation of whether it is possible to enforce the judgment of the ECtHR if it does not comply with the Constitution of the Russian Federation. Thus, the legislator effectively legitimized the previously stated position of the Constitutional Court on granting it new powers.

The dispute between former shareholders of the oil company Yukos and Russia had stretched on for ten years until its consideration by the ECtHR. In 2004, Yukos shareholders requested compensation from the Russian government to the ECtHR in the amount of almost 38 billion euros for the actions of the Russian government that led to the bankruptcy of the company. After a lengthy admissibility trial, which was resolved only in 2009, the ECtHR ruled on the merits in September 2011.[22]

[22] Case of OAO Neftyanaya Kompaniya Yukos v. Russia (App. No. 14902/04) Judgment (Merits) (Sept. 20, 2011). https://hudoc.echr.coe.int/eng#{"itemid":["001-106308"]} (access date 01.18.2020)

The ECtHR found that Russia acted in violation of Article 6 of the ECHR without giving Yukos sufficient time to prepare their case before the national courts. The ECtHR found that these procedural violations restricted the rights of the defense and resulted in a violation of the right to a fair trial under Article 6 of the Convention.

In addition, the ECtHR found two violations of Article 1 of Protocol I (Protection of Property), in particular with regard to the imposition of fines by the authorities in accordance with Russian tax legislation in 2000-2001 and their inability to fairly carry out their activities in relation to Yukos.

According to the decision of the ECtHR, the Russian Federation had to pay compensation to the former shareholders of Yukos in the amount of about 1.9 billion euros. Such an unprecedented amount of compensation, awarded in the context of a human rights trial, caused a negative reaction in Russian political and legal circles, which culminated in the appeal of the Russian Ministry of Justice to the Constitutional Court demanding a decision on the impossibility of execution of the decision.

The essence of the dissatisfaction was that the decision of the ECtHR was of a political rather than a legal nature and violated Russia's sovereignty. The amount that was due was too much for Russia's budget. In this regard, the Ministry of Justice asked the Constitutional Court to recognize the impossibility of implementing the decision of the ECtHR.

The Constitutional Court took an unprecedented step and diminished the role of international human rights law in Russia in the hierarchy of sources of law. The court decided to emphasize only the subsidiary role of the ECtHR. The Constitutional Court considered that the Russian Federation is not obliged to comply with all decisions of the ECtHR if they contradict the Constitution or its principles.[23]

The decision of the Russian Constitutional Court in the Yukos case repeats the judicial basis in the decision in the Anchugov and Gladkov case. The Court reiterated the primacy of the national Constitution. While recognizing the primacy of the Constitution, the Court, in its reasoning, tried to find an appropriate balance between the spirit and letter of the European Convention and the Russian Constitution in the execution of the Court's judicial decisions.[24]

The Constitutional Court in the Yukos case found that failure to comply with the decisions of the ECtHR could be justified in cases where the Constitution provided for a higher level of protection of human rights than those guaranteed by the European Convention in balance with the rights and freedoms of others. The Court indicated that the payment of such a huge sum to Yukos shareholders

[23] Decision of the Constitutional Court of the Russian Federation of January 19, 2017 No. 1-P http://doc.ksrf.ru/decision/KSRFDecision258613.pdf (access date 01.18.2020)

[24] Aksenova Marina, Marchuk Iryna. Reinventing or rediscovering international law? The Russian Constitutional Court's uneasy dialogue with the European Court of Human Rights //I•CON (2018), Vol. 16 No. 4, 1322–1346

would adversely affect the performance of the Russian government in fulfilling social obligations towards its citizens.

Article 53 of the ECHR does provide that its provisions cannot be interpreted in such a way that it would lead to the diminution or restriction of human rights and freedoms, which are provided for by the national legislation of the parties. In particular, article 1 provides that the member states have undertaken to ensure to everyone under their jurisdiction the rights and freedoms defined in Articles 2-18 of the Convention. Article 32 provides that the ECHR has the power to interpret these rights. Finally, Article 46(1) states that the contracting parties undertake to abide by the final judgment of the Court in any case to which they are parties.

The Constitutional Court also found that despite the award by the ECHR of material damage to shareholders, such damage was caused by the illegal activities of the company Yukos. Specifically, the Court pointed out that Yukos had taken advantage of sophisticated illegal schemes to avoid paying taxes. However, the Constitutional Court has quite amicably ruled that illegal actions of an oil company and a large amount of payments do not exclude that Russia can voluntarily accept the decision of the ECtHR and pay some former shareholders, especially those who suffered financial losses as a result of illegal actions of the state authorities. However, such payment is possible only if Yukos pays its debts to creditors first.

1. Dissenting Opinions of the Judges in the Yukos Case Vladimir Yaroslavtsev and Konstantin Aranovsky

In this case, two judges expressed their dissenting opinions in which they disagreed with the conclusions of the Constitutional Court. Judges of the Russian Constitutional Court do not so often express their dissenting opinions, so each of them deserves special attention.

(1) Dissenting Opinion of Judge Vladimir Yaroslavtsev

Judge Vladimir Yaroslavtsev pointed out that Article 43 of the ECHR granted the right of any party to the case, within three months of the date of the chamber's ruling, to submit an application for referral to the Grand Chamber in exceptional cases. However, the Russian Federation did not exercise this right. According to Yaroslavtsev, the Ministry of Justice, addressing the Constitutional Court, was looking for easy ways to break the impasse instead of continuing the dialogue with the Committee of Ministers of the Council of Europe with a view to finding a balanced solution.[25]

[25] Dissenting opinion of the judge Yaroslavtsev to the Decision of the Constitutional Court of the Russian Federation of January 19, 2017 No. 1-P http://doc.ksrf.ru/decision/KSRFDecision258613.pdf (access date 01.18.2020)

(2) Dissenting Opinion of Judge Konstantin Aranovsky

The second opinion in this case was expressed by Judge Aranovsky Judge Aranovsky, like his colleague Judge Yaroslavtsev, argued that the Constitutional Court could not act as an arbitrator in the event of a disagreement between Russia, represented by the Ministry, and the ECHR. He also criticized the inconsistent position of the Russian Ministry of Justice, which did not agree with the ECHR in the part where the Court largely took the position of the Ministry itself. Moreover, in its objections, the Ministry participated in the discussion of the amount of fair compensation to the claimants, thus making it clear that the Russian Government was theoretically ready to pay compensation. However, Ministry later completely renounced its own position and challenged the very possibility of implementing the ECHR decision.[26]

Judge Aranovsky also criticized the Ministry of Justice's arguments that such a substantial amount of compensation would deplete public welfare. In the judge's view, such a position would allow parties to the Convention to refuse each time to comply with the decisions of the ECHR with reference to the burden of social expenditure.

Judge Aranovsky also stated that, despite the fact that the amount awarded by the ECHR is really high, it must be paid. Since the States parties to the Convention did not initially discuss the size of the maximum amount that they are willing to pay as compensation, they can no longer waive such obligations. Therefore, the claim of excessive amount of compensation cannot be put forward as an argument of non-compliance with the decisions of the ECHR. However, Judge Aranovsky also criticized the decision of the ECHR, which awarded compensation to unidentified persons who did not take part in the court proceedings and did not confirm that they suffered losses. Ultimately, Judge Aranovsky concluded that both courts did not handle the case properly and acted as they wanted, not as they should.

Analyzing the decision of the Constitutional Court of Russia in the case of Yukos shareholders, it can be noted that this shows that the Court gave a broad interpretation of the Convention when it allowed the Russian government to defy its obligations, appealing to certain constitutional principles, such as the principle of state sovereignty and the principle of the welfare state.

VI. Conclusion

Even until recently, ambiguous language about the meaning of international law in the Russian Constitution has left room for questions about the weight of international law in the domestic legal

[26] Dissenting opinion of the judge Aranovsky to the Decision of the Constitutional Court of the Russian Federation of January 19, 2017 No. 1-P http://doc.ksrf.ru/decision/KSRFDecision258613.pdf (access date 01.18.2020)

order. However, the Constitutional Court of Russia, by its practice, has gradually built a hierarchy of sources of law, where Constitutional norms took precedence over international treaties. President Putin's constitutional amendments actually legitimized this approach.

Such mixed changes are taking place against the background of a growing number of complaints against Russia, including those related to Ukraine and Crimea.[27] Given the flurry of complaints against Russia in the ECtHR, it is likely that the number of cases in which the Russian Constitutional Court will allow Russian government not comply with the decisions of the ECtHR will only increase.

[27] By 2019, more than 6,000 individual statements https://www.echr.coe.int/Documents/CP_Russia_ENG.pdf (access date 01.19.2020)

【Special Features: Multiple Aspects on Constitutionalism –Asian "Contexts" and its Logic】

The Introduction of Modern Constitutionalism in Central Asian Post-socialist Context: The Case of Constitutional Debate and Development on Human Rights in Uzbekistan in the Twentieth and Early Twenty-First Centuries

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Abstract

This research sheds light on a constitutional debate on and development of human rights in Uzbekistan throughout four constitutions from 1927 to 1992, as well as prospects and challenges in conceptualizing and promoting human rights during and after socialism. As a departure point, this research investigates relevant human rights provisions in the 1927, 1937, and 1978 constitutions, which functioned during the period when a socialist human rights tradition was established and evolved in the then Uzbek Soviet Socialist Republic (Uzbek SSR). It follows with the analysis of the debates on the new human rights and citizens' rights provisions in the 1992 Constitution adopted within the sophisticated transition process from socialism to market economy. This discussion touches upon the theoretical collision between antagonistic theories of rights – the positivist theory originating from a socialist state on the one hand, and the natural law inspired by international human rights law and foreign constitutions. The author argues that the discourse of contemporary constitutional human rights development in the Republic of Uzbekistan still bears evident traces of socialist and positivist conceptions, notwithstanding the government's tendency to distance from the socialist state concept. Constitutional human rights also experience substantial practical challenges bounded by multiple factors, which additionally include provisional imperfection regarding the direct (immediate) implementation of rights and incompetent constitutional review system.

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Contents

I. Introduction

Fragmented deliberations touching upon human rights in Uzbekistan appeared in the early twentieth century. The *1927 Constitution of the Uzbek Soviet Socialist Republic* (1927 Constitution) contained the sporadic and limited provisions on rights afforded mainly to the proletarian class.[1] The following 1937 *Constitution of the Uzbek Soviet Socialist Republic* (1937 Constitution) contained comparatively more rights-related articles.[2] The 1978 *Constitution of the Uzbek Soviet Socialist Republic* (1978 Constitution) had listed close to 40 of rights.[3] The formal discussion on human rights in the USSR, especially its farmer union-republics of Central Asia, generally remained insignificant or void.

The process of transition towards a market economy in Uzbekistan, which began in 1991, necessitated the creation of an entirely new, non-socialist legal system that would promote market economy, democracy and establish the *Rechtsstaat*. The first two decades of the transition emphasized the human rights topic mainly from the critical perspective in the foreign media and human rights forums, and to a lesser degree within domestic public institutions. As of 2021, the situation with a discussion of human rights is relatively open as compared to, for example, as in 2015. However, there is still an exceptional untouchable grey area that relates to 'public interest.'

After the formal demise of socialism, one of the intense discussions on human rights took place during the draft process of the *1992 Constitution of the Republic of Uzbekistan* (1992 Constitution). This process involved the previously unknown elements of the nation-wide constitution draft discussion that continued from October to December 1992. The debate on the chapter on human and

[1] "1927 Constitution of the Uzbek Soviet Socialist Republic [1927 Constitution]" (1927).

[2] "1937 Constitution of the Uzbek Soviet Socialist Republic (1937 Constitution)" (1938).

[3] "1978 Constitution of the Uzbek Soviet Socialist Republic (1978 Constitution)" (1978).

citizens' rights attracted limited comments and recommendations from private and public actors, but even this form of *travaux preparatoires* reveals tensions between natural rights and state-granted rights theories. It also brings into attention a dissent between the universalism of international human rights standards and cultural relativism.[4] The context of the debate on and the development of constitutional human rights, similarly to other new democracies, do not insert any adequate clarity concerning *Rechsstaat*, the rule of law, and *Etat de Droit*.

Legal studies in the Central Asian region traditionally compose a poorly researched area in the English-speaking academic world. Over the past couple of decades, the published contextual international research on Uzbekistan focuses mainly on practical human rights abuses by the government without pausing on the aspects of the constitution-draft process and legal theoretical variations of rights in the present and predecessor constitutions. Also, there is a lack of adequate attention and research to the theoretical constitutional settings by legal scholars in Uzbekistan, whether in Uzbek or Russian languages. Therefore, multiple critical features related to the constitutionalism in Central Asia have yet to be explored.

This research aims to help to correspond to this divergence and proceeds as follows: Part I investigates the constitutional evolution of the socialist human rights structure in Uzbek SSR through a detailed inquiry into specific constitutional provisions from 1927 to 1992. Part II examines the relevant constitutional debates and political tendencies that led to the adoption of the constitutional provisions on human rights in the 1992 Constitution. This part also examines and assesses the effectiveness of the constitutional human rights provisions. Part III concludes with an evaluation of the prospects and challenges of human rights and their protection in Uzbekistan.

II. The Evolution of the Socialist Human Rights Discourse in Uzbekistan from 1927 to 1992

Uzbekistan has promulgated four constitutions; three during the socialist era in 1927, 1937, and 1978, and one since its independence from the Soviet Union in 1992 (see Table 1). Before socialism, under the Russian tsarist administration, territories of present Uzbekistan experienced a dualist legal nature, an extensive practice of Islamic law, and fragmented experience of a non-religious legal system based on civil law tradition.[5] There was no formal, written constitution with any human rights

[4] In Central Asia, policymakers also synonymously use the term Oriental values alongside with Asian values.

[5] Aziz Ismatov and Sardor Alimdjanov, "Developmental Trajectory of Mahalla Laws in Uzbekistan: From Soft Law to Statutory Law," *Nagoya University Asian Law Bulletin* Vol.4 (December 2018): 3.

provision during that period. As a point of departure, the table below provides a concise outline of the provisions on human rights within the mentioned four constitutions.

Table 1. Constitutional Provisions on Human Rights in Uzbekistan (Both during the Socialist and post-Socialist Periods)

	Rights	Constitutions			
		1927 (Fragmented)	1937 (Chapter X)	1978 (Chapter VI)	1992 (Chapter V)
1	Right to life				Article 24
2	Right to liberty and security of the person		Article 126	Article 52	Article 25
3	Right to freedom of movement and right to choose one's residence (including the right to travel abroad)				Article 28 (only movement limited by law)
4	Freedom of expression	Article 7	Article 124	Article 48	Article 29 (limited)
5	Freedom of association and peaceful assembly	Article 8,9	Article 124,125	Article 48, 49	Article 34
6	Freedom of belief and religion	Article 6	Article 123	Article 50	Article 31
7	Freedom of press	Article 7	Article 124	Article 48	Article 29 (limited)
8	Right to be informed (Right to have access to information)				Article 29 Article 30
9	Right to (fair) trial				Article 44 (right to a lawsuit)
10	Right to defense (in criminal proceedings)			Article 169	Article 26, 116
11	Right to be compensated for miscarriage of justice			Article 56	
12	Right to privacy (family, home, telephone or correspondence)		Article 127	Article 48, 53,54	Article 27
13	Right to protect own dignity				Article 27
14	Right to complaint, denunciations,			Article 55, 56	Article 35
15	Right to demonstrate		Article 124	Article 48	Article 33
16	Right to use one own's language before the court	Article 17	Article 109	Article 170	Article 115
17	Right to take part in the conduct of public affairs			Article 47	Article 32
18	Right to make proposals and criticize public institutions			Article 46	
19	Right to referenda			Article 46	Article 32
20	Right to nationality (citizenship)			Article 31	Article 21
21	Right to legal protection			Article 31	Article 22
22	Right to election	Article 92	Article 134	Article 89	Article 117

		(Only proletarian class)			
23	Right to asylum	Article 15	Article 128	Article 36	
24	Right to property				Article 36
25	Right to inherit property		Article 10	Article 13	Article 36
26	Right to housing		Article 10	Article 42	
27	Right to benefit from scientific, literary or artistic production			Article 44, 45	Article 42
28	Right to work	Article 11 (obligation)	Article 11 (obligation); Article 117	Article 38 Article 58 (obligation)	Article 37
29	Right to social security		Article 119	Article 41	Article 39
30	Right to leisure		Article 118	Article 39	Article 38
31	Right to education	Article 10	Article 120	Article 43	Article 41
32	Right to health (since 1992 – qualified medical service)			Article 40	Article 40
33	Right to equality before the law	Article 13 (only Union citizens)		Article 167	Article 18 (only citizens)
34	Equal rights between men and women		Article 121, 136	Article 33	Article 46
35	Right to the maternity of female workers		Article 121	Article 33	Article 65
36	Rights of children			Article 51	Article 64, 65
37	Rights of intellectuals			Article 45	
38	Rights of vulnerable groups			Article 41, 51	Article 45
39	Equal rights among ethnic groups	Article 16	Article 122	Article 32, 34	Article 8
40	Equal rights for Union citizens (Since 1992 equal rights for citizens)	Article 13	Article 18, 122	Article 31	Article 21
41	Equal rights for foreigners (Since 1978 for foreign residents for stateless persons)	Article 14 (only political rights for proletarian class)		Article 35 (limited)	Article 23 (limited to norms of international law)
42	Language rights for national minorities	Article 17	Article 120	Article 43	Article 4

The table above may initially draw to the following general considerations. First, apart from the 1927 Constitution, which placed rights mainly within the general introductory provisions, the subsequent three constitutions included provisions on human and citizens' rights into individually titled chapters. Second, from the viewpoint of comparative importance and constitutional hierarchical structure, these chapters on human and citizens' rights demonstrate a tendency of gravitating from final towards earlier chapters of constitutions. For instance, in 1937 Constitution, known also as

Stalin's constitution, the provisions on human and citizen's rights were positioned only in Chapter X, in 1978 Constitution in Chapter VI, whereas in 1992 Constitution these rights already moved to Chapter V. Such progressive dynamism of gradually placing human and citizens' rights provisions into earlier chapters may demonstrate a comparative importance of human rights. Third, constitutional evolution shows that human rights were mainly preserved, elaborated further, and increased. Although several human rights provisions that existed in predecessor constitutions were later removed, such cases are rare. As an example, the 1927 Constitution's Article 14, which extended equal political rights to (proletarian) foreigners, was omitted in subsequent constitutions.[6] Similarly, the number of rights which existed in socialist constitutions, such as; the right to be compensated for the miscarriage of justice, the rights to make proposals and criticize public institutions, the right to asylum, the right to housing and others were neglected or omitted in the 1992 Constitution.

Simultaneously, modifications in all four constitutions indicate ideological transformations. As a bright example, the absence of the right to private property, introduction, and expansion of the economic, social, and cultural rights in the 1927, 1937, and 1978 constitutions appear to reflect expanding authorization of socialism. On the other hand, the 1992 Constitution revoked many of these provisions. Granting the constitutional right to private property became one of the central modifications signaling about the switch towards a market economy. Moreover, the 1992 Constitution drafters had to revise the significant economic, social, and cultural rights introduced in the 1978 Constitution. Notably, in the socialist period, the right to work was under the direct prerogative of the socialist government, or in other words, it was the government's obligation to secure adequate employment for every citizen.[7] Similarly, the 1978 Constitution secured for everyone the right to free education at all levels, the right to paid leisure, and the right to free medical service.[8] The 1992 Constitution drafters, out of their grave concerns that extending such 'generous' rights would be unrealistic within the realities of transition from socialism to a market economy, unanimously neglected these provisions.

The evolution of human and citizen's rights also suggests that there is a profound difference between all four constitutions, which might owe considerably to the socio-political circumstances in which these constitutions were brought into existence. Indeed, each of the four constitutions appears

[6] Article 14 of the 1927 Constitution of the Uzbek Soviet Socialist Republic [1927 Constitution].

[7] Article 11 of the 1927 Constitution of the Uzbek Soviet Socialist Republic [1927 Constitution]; Article 11 of the 1937 Constitution of the Uzbek Soviet Socialist Republic (1937 Constitution); Articles 38 and 58 of the 1978 Constitution of the Uzbek Soviet Socialist Republic (1978 Constitution). Note that all three socialist constitutions classified work as an obligation.

[8] Respectively articles 39, 41, and 43 of the 1978 Constitution of the Uzbek Soviet Socialist Republic (1978 Constitution).

to be a product of its own epoch. While the 1927 Constitution was shaped by the initial slogans of the socialist revolution and dictatorship of the proletariat, the Stalin's 1937 Constitution stressed additionally about "the achievement of socialism and the harmony of classes."[9] Such approach, however, resulted in dissonance between the promises made in the 1937 Constitution and realities. Further, the 1978 Constitution, known as Brezhnev's Constitution apart from similarly determining the ideas of people's democracy, dictatorship of proletariat, and centrally planned economy, had also consolidated and institutionalized citizen's social and economic rights. This constitution, as a direct copy of the 1977 USSR's Constitution, appeared to reflect the general sense that the Soviet government had reached the state of "developed socialism" (*razvitoy sotsializm*).[10] Eventually, the 1992 Constitution was theoretically inspired mainly by the ideas of independence, sovereignty, and attempts to build an economy modeled on Western-type, establish democracy, and vibrant civil society.

All three, 1927, 1937, and 1978 constitutions left no space for pluralistic ideas but incorporated solely the Marxist-Leninist concept in a pursue of socialism and socialist law.[11] The scholarship does not offer a single definition of Soviet-type socialism. Neither do any of the former Soviet socialist constitutions contain a separate explicit provision on it. Some scholars tend to interpret it by stressing on the socialist, centrally administered or command economy with considerable public ownership.[12] While stressing about non-economic aspects of socialism, the vanguard role of the Soviet Communist Party and democratic centralism appear as bright characteristics.[13] The fragmented constitutional analysis allows interpreting socialism as a political ideology promoting state ownership of the means of production within a state-command economy and under the unshared authority of the communist party.[14] Such interpretation appears to have created a political environment in which natural rights idea, as based on international human rights treaties, came to be replaced by the citizen's rights idea based on legal positivism. In other words, in socialist constitutions, rights, including human rights were legal rights granted by the state. As a matter of fact, neither of the Uzbek socialist constitutions

[9] Sarah Davies and Sarah Rosemary Davies, *Popular Opinion in Stalin's Russia: Terror, Propaganda and Dissent, 1934-1941* (Cambridge University Press, 1997), 102.

[10] *Problems of Communism* (Documentary Studies Section, International Information Administration, 1977), 4. Also, see the Preamble of the 1977 Constitution of the USSR, (1977), "A developed socialist society has been built in the USSR.

[11] As an example refer to the article 6 of the 1978 Constitution of the Uzbek Soviet Socialist Republic (1978 Constitution).

[12] P.J.D Wiles, *The Political Economy of Communism.* (Oxford: Basil Blackwell, 1962) As cited in; János Kornai, *The Socialist System: The Political Economy of Communism* (Princeton University Press, 1992), 10.

[13] William Partlett and Eric Ip, "Is Socialist Law Really Dead?," *New York University Journal of International Law & Politics. New York University. International Law Society* 48 (January 1, 2016): 470–71.

[14] Article 6, 11, and 16 of the 1978 Constitution of the Uzbek Soviet Socialist Republic (1978 Constitution).

made a direct reference to the term human rights in any of its sections. Soviet ideologists systematically titled their constitutional chapters regulating rights as 'Citizen's rights and obligations', not 'Human rights' as many foreign non-socialist constitutions did. It is worthwhile to mention that the drafters of the Soviet constitutions had elaborated a fundamental doctrine of socialist citizen's rights, which puts a strong emphasis on the group of social-economic rights and particularly their material guarantees. As an example, the right to housing in the 1977 Constitution secured a provision on "fair distribution of living space under the public control."[15] Other similar examples included strong governmental guarantees of free education at all levels, paid leisure, free health care system, and employment guarantees. Simultaneously, certain vital human rights, such as the right to private property, were omitted in the constitutions because of their apparent conflict with the core socialist settings. Traditional personal freedoms were somewhat neglected. Simultaneous inseparable unity between rights and obligations presupposed that the material guarantees of social, economic rights could become possible upon the conditionality of every citizen's thorough participation in socialism building.[16] Such a general constitutional framework somewhat rejected the natural law doctrine as long as the socialist concept of rights could only be derived from the sources of positive law which were created, granted, and protected by the state.[17]

Foreign observers commented that such instrumentalist nature of Soviet constitutions revealed a strong need for legitimacy and therefore, *inter alia*, put a strong emphasis on rights and duties.[18] Inspired by the doctrine of socialist legality, such instrumentalist approach legitimized a patronalistic idea that the Soviet Communist Party had exclusive competence to use law as a tool to implement its policies, adopt, amend and, if necessary, abolish the constitution as long as Party's highest authority was represented by the will of the Soviet citizens. Such logic in all three Uzbek socialist constitutions echoes Marxist-Leninist approaches towards the superiority of the state and its "democratic" dictatorial structure.[19]

Hence, by 1978, socialist constitutional evolution had resulted in the formal construction of the socialist citizen's rights theory. This theory had replaced a concept of human rights by citizen's rights

[15] Article 42 of the "1977 Constitution of the Union of the Soviet Socialist Republics" (1977).

[16] Article 59 of the 1978 Constitution of the Uzbek Soviet Socialist Republic (1978 Constitution).

[17] F. J. Ferdinand Joseph Maria Feldbrugge, Gerard Pieter Van den Berg, and William Bradford Simons, *Encyclopedia of Soviet Law* (BRILL, 1985), 124.

[18] Gordon B. Smith, Peter B. Maggs, and George Ginsburgs, *Soviet and East European Law and the Scientific-Technical Revolution* (Pergamon Press, 1981), 121.

[19] Refer further to; Joseph V. Femia, "Gramisci, the 'Via Italiana', and the Classical Marxist-Leninist Approach to Revolution," *Government and Opposition* 14, no. 1 (1979): 66–95.

by enshrining rights and duties to citizens – individuals bound to state by the political and legal bond.[20] A closer look at those rights demonstrates a clear prioritization of social and economic rights over civil and political rights and freedoms. Legal scholarship and general socialist constitutional discourse simultaneously demonstrated a strong emphasis on collective or social interests in promoting rights and duties of citizens vis-à-vis the state, rather than an individualistic emphasis on human rights as usually is the case in the Western constitutions. In the context of socialist legality, human rights in the Uzbek SSR emerged as positive citizen's rights granted by the state. Opposed to the theory of natural rights, the respect and realization of such citizen's rights depended heavily on the state's will.

In 1991, socialism officially ended amid the collapse of the USSR, which catapulted Uzbekistan, as well as other former Soviet Central Asian republics towards independence and attempts to build an economy modeled on the Western-type and entirely new legal system to promote a smooth transition. In December 1992, Uzbekistan adopted a new constitution.

III. Constitutional Rights in the 1992 Constitution: Introduction of Positive or Natural Human Rights?

The current Constitution of Uzbekistan was enacted in 1992 after the demise of the USSR and, hence, is often related to as the first constitution or even Karimov's constitution.[21] Indeed, some domestic legal scholars who were members of the constitution draft commission asserted that Karimov was the "main author of the Constitution."[22] The term 'first' in the context of the 1992 Constitution does not always make a logical sense for some scholars because it ignores the role and essence of the previous three constitutions. In this regard, a prominent domestic scholar asserts that the principal difference of the 1992 Constitution from previous constitutions is the mere fact that it was not directly and unconditionally imposed by the USSR, but elaborated and adopted by an independent, sovereign government.[23] While acknowledging the primacy of international law, this constitution has no

[20] For a discussion on the difference between nationality and citizenship in the post-Soviet context, refer further to; Aziz Ismatov, "Citizenship Regulation in the Post-Soviet Space; an International Legal Study in Nationality and Statelessness" (Doctoral dissertation, Nagoya University, 2014);

[21] D Carlisle and Levitin, L, *Islam Karimov: President of the New Uzbekistan* (Vienna: Grotec, 1995); L Levitin, *Islom Karimov: O'zbekiston Respublikasining Birinchi Prezidenti [Islom Karimov: The First President of the Republic of Uzbekistan]* (Tashkent: Uzbekistan, 1997), 239–40.

[22] Saidov, Akmal and U Tadjihanov, *Islom Karimov Konstitutsiya to'grisida: O'zbekiston Respublikasining Konstitutsiyasi o'rganuvchilarga Yordam.* (Tashkent: Akademiya, 2001), 156.

[23] Saidov, Akmal, *O'zbekiston Konstitutsiyasi Tarihi [History of Uzbekistan's Constitution]* (Tashkent: Tasvir, 2018), 340.

mentioning about the communist ideology, proletarian class dictatorship, democratic centralism, or a single-party leadership.

Its preamble's first sentence manifests that "the people of Uzbekistan solemnly declare their adherence to human rights and principles of state sovereignty."[24] By providing the term human rights, Uzbekistan's constitution draft commission members presumably demonstrate a shift from their traditional belief that the constitution must recognize and protect rights not only for citizens but also for foreigners, refugees, and stateless people who live and work in Uzbekistan legally. This constitution also explicitly indicates a shift away from the 'socialist-oriented' economic, social, and cultural rights enshrined in the previous socialist constitutions. The draft negotiation process demonstrates that most of these rights would be difficult or nearly impossible to realize within the new socio-political realities of transition. During the draft and nation-wide discussion process, the commission members had received multiple suggestions and recommendations from private and public actors to amend the economic and social rights with their reference to the predecessor socialist constitutions. For example, numerous recommendations from private parties, which suggested including into the 1992 Constitutions the provisions on free education in all levels and free healthcare as they existed in articles 40 and 47 of the 1978 Constitution, did not find support with the commission.[25] Current article 41 of the 1992 Constitution provides for the right to education, but such right is only free at the elementary level. Article 40 provides only for the right to qualified healthcare and contains no wording on free or exceptional cases of state-covered healthcare.

Similarly, the previous socialist constitution provided that citizens had the right to be employed and have state-provided housing. That made a state directly responsible for creating and managing jobs as well as for providing housing assistance.[26] A group of activists also demanded the articles regulating employment and housing in the 1992 Constitution contained similar wordings.[27] However, the 1992 Constitution merely provides that "everyone has the right to work ... and unemployment

[24] Preamble, "The Constitution of the Republic of Uzbekistan" (1992).

[25] "O'zbekiston Respublikasining Markaziy Davlat Arhivi [Central State Archive of the Republic of Uzbekistan] XII Chaqiriq, O'zbekiston Respublikasining Oliy Kengashining 1992 Yil 8 Dekabrda Bo'lib O'tgan XI Sesssiya Materiallari [11th Plenary Session Materials]" (Fond-M-69, N 1, 154, 1992), 43, 99, 139, 150.

[26] 1978 Constitution of the Uzbek Soviet Socialist Republic (1978 Constitution), Articles 38 and 42.

[27] "O'zbekiston Respublikasining Markaziy Davlat Arhivi [Central State Archive of the Republic of Uzbekistan] XII Chaqiriq, O'zbekiston Respublikasining Oliy Kengashining 1992 Yil 8 Dekabrda Bo'lib O'tgan XI Sesssiya Materiallari [11th Plenary Session Materials]," 74–95.

protection as prescribed by law".[28] As for the right to housing, the 1992 Constitution does not demonstrate any explicit provision that would be identical to that of the 1978 Constitution.

Most notably, the 1992 Constitution included and enhanced several human rights, some of which were transplanted from the Universal Declaration of Human Rights. Such rights include; the right to life (Article 24)[29], equal citizenship (Article 21), the right to be informed and access to information (Articles 29, 30), the right to property (Article 36), the rights to maintain a secret of bank accounts and legal guarantees on inherited properties (Article 36), the right for entrepreneurship (Article 53), the right to lodge complaints and lawsuit (Article 44), the right to freedom of movement and right to choose one's residence (including right to travel abroad) (Article 28). Although the practical implementation of these rights still raises many questions, these new rights were considered crucial for the democratic and economic state-building of Uzbekistan in the post-1992 period.[30]

Mentioned novelties came into existence because of several factors. Firstly, it was the state sovereignty that came unexpectedly and made Uzbekistan, as well as many other former Soviet republics to deal with appearing challenges, including legal reforms, in a very unprepared manner. Such a situation necessitated introduction of the key principles of the market economy, such as respect and protection of the private property, free competition, and freedom of movement. As these ideas existed in successful market-economies where they appeared crucial, the policymakers in Uzbekistan unanimously decided to safeguard them. Therefore, the 1992 Constitution started *de jure* recognizing these ideas, for instance, the right to private property and freedom of movement. Subsequently, the reflection of many universal human rights and ratification of a range of international human rights treaties was considered as a step towards qualifying for membership of the so-called "international democracy club." Eventually, the 1992 Constitution sets up a mechanism of check-and-balance between different branches of the government and refers to the "law-governed state" (*pravovoe gosudarstvo).*[31]

[28] Article 37 of The Constitution of the Republic of Uzbekistan.

[29] Notwithstanding the provision of the right to life, the capital punishment was abolished in 2008. Refer further to; Aziz Ismatov and Eliko Ciklauri-Lammich, "Abolishing Capital Punishment in Uzbekistan – Between External Pressure and Pragmatism," *Zeitschrift Für Die Gesamte Strafrechtswissenschaft* 130, no. 1 (2018): 279–302, https://doi.org/10.1515/zstw-2018-0010.

[30] Saidov, Akmal, *O'zbekiston Konstitutsiyasi Tarihi [History of Uzbekistan's Constitution]*, 371.

[31] Preamble and Article 11 of The Constitution of the Republic of Uzbekistan. The principle of separation of powers into the legislative, executive and judicial shall underline the system of state authority of the Republic of Uzbekistan.

The term 'law-governed state' (*pravovoe gosudarstvo)* within the text of the 1992 Constitution appears once in the Preamble. [32] The mere existence of this term in the text of the 1992 Constitution with no definition as such creates a legal-terminological axiom as it may theoretically reflect several meanings. First is a Russian equivalent of the German term *Rechtsstaat*.[33] The concept of *Rechtstaat* is more oriented towards the nature of the state and has its roots in the written constitutions.[34] Historically, *Rechtstaat* was seen as a counterforce to the absolutist state power in which the executive branch had unlimited authority. Hence it presupposed strong judicial and legislative branches as necessary conditions for the well-balanced power.[35] This term was imported from Germany to Russia in the late nineteenth century, and subsequently was borrowed by some former Soviet republics, including Uzbekistan, from Russia. Another meaning may suggest a French originated *Etat de Droit* as a positivist concept of the *pravovoe gosudarstvo,* which concentrates more on the state's supervision of the statutes.[36] Furthermore, such terminological axiom looks even more obscure because Article 15 of the 1992 Constitution contains a provision on the '*verkhovenstvo konstitutsii i zakona'* which means 'rule by the law,' not 'rule of law.' Scholars assert that ambiguous legal terminological practices and focus on the 'rule by the law' is a distinguishing characteristic of many new democracies that had experienced socialism and evolved within the conditions of socialist legality.[37]

The 1992 Constitution also demonstrates legal imperfection, specifically when it comes to human rights. First, although the 1992 Constitution became a pioneer in terms of using the term human rights, it does not provide a clear distinction between human rights and citizen rights, but simply conflates them. The 1992 Constitution of Uzbekistan dedicates its Part II to the Basic Human and Citizen Rights, Freedoms and Duties and, converges many universal human rights. Consequently, by additionally taking into consideration provisions on "equal rights and freedoms for citizens" (Article 11) and "state

[32] Preamble, The Constitution of the Republic of Uzbekistan. "The people of Uzbekistan.... setting forth the task of creating a humane and democratic law-governed state"

[33] Hiroshi Oda, "The Emergence of Pravovoe Gosudarstvo (Rechtsstaat) in Russia," *Review of Central and East European Law* 25, no. 3 (1999): 373.

[34] Eric Wennerstrom, *The Rule of Law and the European Union* (Uppsala: lustus Forlag, 2007), 73. This is opposed to the "Rule of law" which is believed to have appeared in non-written constitutions or in legal precedents. .

[35] "Doklad o Verkhovenstve Prava, CDL-AD (2011)003rev" (Venice, April 2011), 5.

[36] Wennerstrom, *The Rule of Law and the European Union*, 73.

[37] V.D. Zor'kin, "Verkhovenstvo Prava i Pravovoe Soznanie [The Rule of Law and Legal Consciousness]," in *The Rule of Law: Perspectives from Around the Globe*, Francis Neate (IBA, 2009), 43–54; Sergey Holovaty, *The Rule of Law* (Kyiv: Phoenix Publishing House, 2006), 1655–65; Tuori Kaarlo, "The 'Rechtstaat' in the Conceptual Field - Adversaries, Allies and Neutrals, Associations" Vol 6, no. Number 2 (2002): 212.

guarantees the rights and freedoms of citizens" (Article 43), this constitution suggests that provisions on human rights are only extended to citizens and ignore foreigners, refugees and stateless who legally reside and work in Uzbekistan. Many progressive foreign constitutions do not draw such a distinction between citizens and non-citizens.[38] Second, many rights in the 1992 Constitution make further references to the laws adopted by the parliament and normative-legal acts (*normativno-pravovye akty*) adopted and promulgated by the public agencies. This outsourcing eventually paves the way for both, public agencies' ability to promulgate normative-legal acts that may arbitrarily limit constitutional rights, and obstacles to practice and protection means of constitutional rights when they are violated.

The pre-2016 international reports on human rights in Uzbekistan are traditionally limited and highly critical. The existing small number of reports and publications mainly provide critical human rights record with a focus on specific rights and their systematic violation by the government.[39] The freedom of religion and freedom of expression are some of many examples.[40] Almost in all publications, authors directly or indirectly argue that human rights, as provided in the 1992 Constitution, appear more as a favor that might be restricted or generously granted by the state. This approach, coupled by the fact that the 1992 Constitution sporadically contains the phrases such as, "the State expresses...", "the State builds...", "the State guarantees...", "the State ensures...", "the State

[38] Richard B. Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press, 1984); David Cole, "Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens Symposium: Rounding Up Unusual Suspects: Human Rights in the Wake of 9/11," *Thomas Jefferson Law Review* 25, no. 2 (2002–2003): 372. International human rights law, with the exception of voting rights and the right to take part in public affairs, extends rights to citizens and non-citizens alike. This is getting outdated for Europe (especially EU and EEA) where residence becomes more and more important. This is true for many political rights which within the EU and the EEA can be exercised by any EU or EEA citizen at the place of their residence. In the EU, e.g., any EU citizen is entitled to vote in local and European elections at the place of their residence (e.g. a German citizen residing in Hungary), and some EU countries even opened their national elections to EU citizens residing in the country. The process of looking at residence rather than at citizenship is even more pronounced in the collision of laws where the "personal status" is more and more defined according to residence.

[39] For ex., "Democratization and Human Rights in Uzbekistan (October 18, 1999) Document No. 7," *Series 3: Basket III Hearings before the U.S. Commission on Security and Cooperation in Europe and Other Selected Congressional Hearings, Reports and Prints* 34 (1999–2000): i–108; Abdullahi An-Na'im, "Human Rights and Islamic Identity in France and Uzbekistan: Mediation of the Local and Global," *Human Rights Quarterly* 22, no. 4 (2000): 906–41; Colin Harvey and Robert P. Barnidge, "Human Rights, Free Movement, and the Right to Leave in International Law," *International Journal of Refugee Law* 19, no. 1 (March 1, 2007): 1–21; Oskar Lehner, "Respecting Human Rights in Central Asia: Will This Stabilize or Destabilize the Region," *Security and Human Rights* 20, no. 1 (2009): 48–55; Scott Newton, *The Constitutional Systems of the Independent Central Asian States: A Contextual Analysis* (Bloomsbury Publishing, 2017); Erika Dailey, "Uzbekistan: The Human Rights Implications of an Abuser Government's Improving Relations with the International Community," *Helsinki Monitor* 7, no. 2 (1996): 40–51.

[40] John R. Pottenger, "Civil Society, Religious Freedom, and Islam Karimov: Uzbekistan's Struggle for a Decent Society," *Central Asian Survey* 23, no. 1 (March 1, 2004): 55–77; Pottenger; Reuel R. Hanks, "Religion and Law in Uzbekistan," in *Regulating Religion: Case Studies from Around the Globe*, ed. James T. Richardson, Critical Issues in Social Justice (Boston, MA: Springer US, 2004), 319–30; Zhanna Kozhamberdiyeva, "Freedom of Expression on the Internet: A Case Study of Uzbekistan," *Review of Central and East European Law* 33, no. 1 (January 1, 2008): 95–134.

regulates" makes an impression that rights are indeed granted by the state, and not incorporated as natural rights. For example, when the 1992 Constitution draft commission originally proposed to the president Karimov Article 19, it stated that;

> "…the citizens of the Republic of Uzbekistan are entitled to natural rights and freedoms. Such rights are inalienable and no one is entitled to limit such natural rights and freedoms except for when there is a valid court decision".

The former member of this commission reported that after reading this draft article, Karimov personally removed the term "natural rights" and largely redrafted the text in the following way;

> "All citizens of the Republic of Uzbekistan shall have equal rights and freedoms, and shall be equal before the law without discrimination by sex, race, nationality, language, religion, social origin, convictions, individual and social status."[41]

Here the question appears, why such conflict and flaw exist in the 1992 Constitution? One hypothesis may suggest that the difference between the strong conceptualization of socialism-rooted positivism of rights and universal human rights standards still composes a grey area within Central Asian constitutionalism, of which Uzbekistan is one bright example. One fundamental problem was the personnel: other than Urazaev, Agzamkhodjaev, Rakhmankulov, and Saidov, the newly independent Uzbekistan had very few constitutional experts who could be involved in the work of the commission. Out of 64 commission members who were predominantly Soviet bureaucrats, only four mentioned individuals were experts in constitutionalism.[42] Nevertheless, even mentioned constitutionalists belonged to the generation of traditional Soviet legal scholars who were educated and formed as academics within a highly centralist state and law concepts. As long as the commission members were influenced by the socialist law and ideology, they have sporadically applied a positivist approach to many constitutional provisions. In other words, they took an approach that echoes the concept of socialist rights according to which the unlimited will of the state is considered to be a sole

[41] This provision still exists in the Article 18 of the 1992 Constitution. Saidov, Akmal, *O'zbekiston Konstitutsiyasi Tarihi [History of Uzbekistan's Constitution]*, 207.

[42] "Postanovlenie o Sozdanii Konstitutsionnoy Komissii [Decree on Establishment of the Constitutional Commission]" (Verkhovniy Sovet UzSSR, XII Sozyv VS, 2-ya Sessiya, June 1990), F-2454, N6, 7091 62-67, Gosudarstvenniy Tsentral'niy Arkhiv. And also, "Materiali Pervogo Zasedaniya Konstitutsionnoy Komissii," 1991, Gosudarstvenniy Tsentral'niy Arkhiv, 4. Notably, this commission was first established in June 1990 and initially included 64 prominent persons. Later in July 1992 the number was raised to 71 persons. The working group formed in April 1991 included 32 persons. Up until, December 1992 when the constitution was promulgated the composition of this commission was slightly changed several times.

source of law. In other words, this approach presupposed that the state acts as a grantor of rights in the constitution. Such an approach might additionally reflect the traditional opinion of Soviet jurists according to which the state is responsible for managing, providing and supervising out of own interest all living essentials that also include rights and obligations.[43] Another aspect that demonstrates a clear trace of the socialist concept of rights in the 1992 Constitution is the conflict between human rights and citizen's rights, which might eventually question the absolute nature of rights *per se*. The universal human rights norms are in general absolute norms and do not contain any dependency from the will of the state. They do not refer to the statutes and normative legal acts but instead set a model or moral standard for implementation.[44] In contrast, the philosophy of addressing rights as granted by the state, theoretically, and practically results in a deviation with the international human rights standards based on absolute or natural rights theory.[45]

IV. Post-2016 Developments: Human Rights at the Crossroads?

In 2016, Uzbekistan experienced a transition of political power. Perhaps the first positive sign that demonstrated the new leadership's respectful approach towards human rights in Uzbekistan became the United Nations High Commissioner's for Human Rights visit to this country in May 2017. Many human rights watchdogs evaluated such a high-level UN representative's visit to Uzbekistan over the decades as a crucial opportunity for initiating long overdue and badly-needed human rights reforms for being viewed as a constructive international partner.[46]

Under the new leadership, the state adopted the 2017-2021 Action Strategy, which targeted five priority development areas.[47] One of the priority areas directly touches upon the rule of law reforms, including in judicial and legislative sectors. Objectively, the orientation of this strategy is mainly progressive and matches the views expressed long by foreign and some local experts. As a part of this strategy, in 2017, the government initiated a series of constitutional amendments, which, among other

[43] V Petrov, V Semyonova, and K Shkenev, *Osnovy Sotsial'nogo Gosudarstva [Fundamentals of Socialist State]* (Nizhniy Novghorod: NNGASU, 2016), 224.

[44] Antonio Cassese, *Five Masters of International Law: Conversations with R-J Dupuy, E Jiménez de Aréchaga, R Jennings, L Henkin and O Schachter* (Bloomsbury Publishing, 2011), 183.

[45] Refer further to John Finnis, *Natural Law and Natural Rights* (OUP Oxford, 2011), 198–223.

[46] International Partnership for Human Rights, "First-Ever Visit by UN High Commissioner for Human Rights to Uzbekistan," May 2017, https://www.iphronline.org/firstever-visit-by-un-high-commissioner-for-human-rights-to-uzbekistan-20170510.html. [Accessed on January 9, 2020]

[47] "Strategiya Deystviy Po Pyati Prioritetnym Napravleniyamhfpdbnbz Respubliki Uzbekistan v 2017-2021 Gogakh.," *Strategiya Deystviy 2017-2021*, http://strategy.gov.uz/ru. [Accessed on January 9, 2020]

things, resulted in a review of the judiciary's role in protecting the citizens' rights and freedoms.[48] Furthermore, within the framework of the strategy, Uzbekistan started developing an adequate awareness of its obligations concerning international treaties and commitment to protecting human rights. The latter resulted in vibrant discussions among various segments of local society about relatively large gap between the law and its implementation, especially for constitutional rights. In particular, it has been a long and commonly agreed critics that while the 1992 Constitution enacted progressive human rights provisions, some of the rights have not always been fully implemented, including the freedom of movement and residence, freedom of press, freedom of thought, speech and opinion, right to file complaints and many other provisions.

In this regard, the Universal Periodic Review on Uzbekistan in May 2018, specifically the compilation of UN and summary of stakeholders' contents demonstrated the post-2016 Uzbekistan's visible progress in strengthening human rights and freedoms. Whereas all previous evaluations were highly critical[49], the UPR of 2018 had observed positive changes in multiple human rights areas including, addressing such long-standing problems as child labor, political prisoners and freedom of expression, harassment, civil society, women's rights, and domestic violence, political and civic participation. Together with that, many states, considering Uzbekistan mostly positive achievements, strongly recommended to take further steps in preventing torture and ill-treatment, lifting restrictions for civil society groups, journalists and human rights activists, decriminalize consensual sexual activities between adult males, take further steps in enhancing religious freedom and rights of people with disabilities.[50]

Hence, the post-2016 period has so far demonstrated that Uzbekistan has gained a relatively better understanding of human rights. Such commitments are also simultaneously signaled by establishing the office of the Business Ombudsperson and taking steps for ratification a core United Nations convention – *Convention of the Rights of People with Disabilities*. Uzbekistan additionally set up an ambitious plan to develop and amend many codes and statutes regulating rights and freedoms. There

[48] "Zakon Respubliki Uzbekistan O Vnesenii Izmeneniy v Nekotorie Statyi Konstitutsii Respubliki Uzbekistan, (V chastnosti, Statyi 80, 93, 108 i 109)" (2017). In particular, "The Central Electoral Commission, an independent, permanent and open State body that organizes elections for the President and for the Oliy Majlis (the national parliament) and referendums in Uzbekistan, has been given the right to bring cases involving questions of constitutionality before the Constitutional Court upon the proposal of the Office of the Human Rights Commissioner (Ombudsman)".

[49] For example, "UN Human Rights Committee, Concluding Observations, Uzbekistan. U.N. Doc. CCPR/CO/71/UZB (2001),"; "UN Human Rights Committee, Concluding Observations, Uzbekistan. U.N. Doc. CCPR/CO/83/UZB (2005),".

[50] "Compilation on Uzbekistan Report of the Office of the United Nations High Commissioner for Human Rights; A/HRC/WG.6/30/UZB/2," May 2018, Human Rights Council, "Report of the Working Group on the Universal Periodic Review (Uzbekistan), A/HRC/39/7," July 2018.

is also a positive picture of raising human rights awareness among public and non-public agencies and the existence of human rights in legal curricula. On the other hand, international human rights watchdogs warn that much of the practical work still has to be done to secure human rights.

Furthermore, the progress on human rights demonstrates simultaneously a hidden and continuous debate between two opposing school of thoughts: the traditional school of socialist legality inherited from the former Soviet Union and based on a positivist approach towards the state-granted rights and freedoms from one hand, and a growing number of human rights activist advocating the primacy of natural rights both in law books and practice. Simultaneously, scholars may often detect in Uzbekistan a common tendency of promoting or giving a higher degree of respect to communitarian rights over individual rights and liberties. There might be two explanations for that.

Firstly, Uzbekistan is a newly independent and developing state which had inherited from its socialist predecessor an influential communitarian culture as opposed to western individualism, which was mainly associated with bourgeois rights and, therefore, actively criticized.[51] Such culture had been extended to every aspect of social life, including rights, and always placed social or collective interests above individual. This tendency had its own long-term impact on society as a whole, or in other words, the socialist legacy contributed to the formation of the collectivist society in the former socialist world. Thus, the fragmented appearance of the socialist approach towards human rights by focusing on state and citizens and separately, citizens' societal responsibilities, can be seen as one way towards understanding the communitarian character of rights.

The second viewpoint has a direct relation to the theory of cultural relativism. This theory asserts that "human rights cannot be universal, but should be understood as products of cultural, economic and social conditions in a given society. Such conditions are determinants of human rights norms, and each state varies in the form and substance of its human rights norms and extent of their protection".[52] Many conservative policymakers in Asia, by justifying this theory, often refer to their "Asian values" and say that the Asian concept of collectivist society centered around the family or having traditionally strong family ties is fundamentally different from Western individualist societies.[53] Similar to many authoritarian states in Asia, for example, Myanmar, Vietnam, or Singapore, such an approach to traditional values also echoed in the numerous speeches and essays of Karimov.

[51] This has later transformed into the criticism of Eurocentric approach which emphasized civil and political rights at the expense of economic and social rights.

[52] Tae-Ung Baik, *Emerging Regional Human Rights Systems in Asia* (Cambridge University Press, 2012), 55.

[53] Michael D. Barr, *Lee Kuan Yew: The Beliefs Behind the Man* (Georgetown University Press, 2000), 220.

For example, Karimov regularly claimed that the civil society model in Uzbekistan would be alien and unviable without such vital segments as a collective consciousness and recognition of the leading role of public authorities. In other words, civil society based on collective consciousness - a characteristic which traditionally unified people in the region, in sharp contrast to the Western individualism, was regarded as the most applicable model for achieving a common good. Regarding building a democratic society, he claimed collectivity, order, and respect towards authority as a unique tradition of the Asian society that pertained own customs and demonstrated consciousness concerning the interests of the majority rather than that of the West, which is too cautious about pluralism of opinions and individual freedoms.[54]

Given such a dichotomy, a question appears whether the communitarian nature of the rights enshrined in the constitution is more a specific (post-) socialist tendency or genuine Asian development rooted in Asian values? As such a situation exists in many (post-) socialist, (post-) authoritarian states, it is not always easy to differentiate between two overarching theories. In this regard, one hypothesis may suggest that given strong tendencies of cultural relativism in even non-socialist Asian states which eventually reflects in communitarian rights, and widely individualist orientation in some post-socialist states of Eastern Europe or even former Soviet Baltic republics, the communitarian rights phenomenon in Uzbekistan appears to be more of a product influenced by the cultural relativism. Perhaps, this is the reason for persisting and never-ending scholarly conflict between the younger generation of universalists and conservative representatives of cultural relativism in the region.

Simultaneously, there is a trend of promoting liberal and natural rights conception towards the interpretation of human rights. Mainly young legal academics who advocate this trend attest that human rights, as long as they are natural and fundamental, do not and should not be subjected to the will of the state. Constitution, therefore, must reflect purely universal standards, and must never be dependent on the whims of the state.

The 1992 Constitution, even presently also suffers from a specific legal textual shortage. Part II on the Basic Human and Citizen Rights, Freedoms, and Duties continue limiting specific provisions that would typically be considered as human rights for citizens only. Such provisions include the right to freedom of movement and the right to choose one's residence (Article 28), the right to demonstrate

[54] Sardor Alimdjanov, "A Political Study on the Nature of Mahalla Institution and Its Relationship with Local Government", Doctoral Dissertation (Nagoya University, Graduate School of Law), (2019), 30. See also Islam Karimov, *Uzbekistan Na Poroge XXI Veka:Ugrozy Bezopasnosti, Usloviya I Garantii Progressa [Uzbekistan on the Threshold of the XXI Century: Security Threats, Conditions and Guarantees of Progress]* (Tashkent: Uzbekistan, 1997), 177-180;

(Article 33), the right to access information (Article 30). Mentioned provisions demonstrate state's sensitivity towards civil and political rights and are in apparent conflict with universal standards. For instance, Article 12 of the International Covenant on Civil and Political Rights, to which Uzbekistan is a state party, asserts that freedom of movement and liberty to choose residency must be extended to everyone lawfully within the territory of the state. Indeed, the 1992 Constitution had largely replaced the previous socialist approaches towards rights as granted by the state, but a closer look shows that such approach was not abandoned entirely. Also, the constitution does not clearly state the principle of immediate effect of the human rights that would have constitutionally guaranteed their adequate protection. The absence of a relevant text raises serious concerns regarding the quality of the constitutional provisions or rights and freedoms.

The 1992 Constitution also does not stipulate several essential rights and freedoms reflected in the ICCPR and many other progressive constitutions. Such rights, *inter alia*, include the right to use one's mother tongue and select the language of communication, the right to marry and divorce, the right to live in a clean environment, the right not to be imprisoned on the grounds of inability to fulfill contractual obligations and other. Therefore, scholars and practitioners have yet to think and discuss the nature of the rights enshrined in the constitution and consider general human rights as a dynamic concept.

Although the 1992 Constitution provides a long list of rights and a separate provision on the stand-alone constitutional court,[55] Uzbek constitutional review has been mostly non-existent. In fact, over almost 29 years since the collapse of the Soviet Union, the Uzbek Constitutional Court (CC) has issued fewer decisions than the Soviet Committee for Constitutional Supervision *(Komitet Konstitutsionnogo Nadzora SSSR)* issued in 18 months of its short but fascinating life. (see Table 2) Presently, there is no individual access to the CC. Analogically to the Kelsen's original idea of constitutional review, the framers of the CC of Uzbekistan rejected *actio popularis*.[56] Hence, citizens do not have the right to make an application to the CC, which, in turn, would have been obliged to review the constitutionality of a statute. It is one of the central critical issues about the constitutional principle of protection of fundamental rights in the acts of legislative and executive branches of power. As most violations of fundamental rights in Uzbekistan originate from executive acts and court judgments, individuals have no right to file a complaint to the CC after exhausting all remedies at the

[55] Article 109 of the the Constitution of the Republic of Uzbekistan (1992); "Konstitutsionniy Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan, ZRU-431" (2017).

[56] Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution* (Journal of politics, 1942), 197.

ordinary courts. In other words, there is no possibility to initiate a constitutional review of the executive acts, which are believed to result in the violation of individuals' rights, once ordinary courts fail to quash them.

Table 2. Compilation of the Republic of Uzbekistan Constitutional Court's cases as provided in the national legal database.
Source: (https://www.lex.uz/ru/search/nat?body_id=806&fform_id=8837) [Accessed on January 10, 2020]

Year	Number of cases		
	CC Decree	CC Decision	CC Rulings
2019	1		
2018	1		
2014	1		
2009		1	
2008		1	
2004	1		
2003	2		
2002	2		
2001		2	3
1998	2		
Total: 17 cases since 1998			

V. Conclusion

The current Constitution of Uzbekistan (enacted in 1992 and amended in 2017) dedicates its Part II to the Basic Human and Citizen Rights, Freedoms and Duties. By taking a careful look at the contents of this part, it is evident that human rights are sporadically embodied not as natural rights and freedoms but as positivist rights. There is still a strong association within the government and society that the state is the primary grantor of rights, and changing such logic is a time-consuming process in Uzbekistan.

The word human rights, which had been rejected in the socialist constitutions, was provided for in the 1992 Constitution. The question, namely, why human rights were introduced and what were the reasons for Uzbekistan behind its adoption in the early 1990s, has not been explicitly clear yet. One reason may include the intention of the policymakers to integrate sovereign Uzbekistan into the so-called 'Western democratic club.' Perhaps, the same reason resulted in the creation of the separate Constitutional Court evaluated by mane as a façade institution. Another reason is the open rise of anti-socialist reformists upon the collapse of the USSR, who promoted political pluralism and

advocated for the draft constitution unconditionally included provisions on human rights. Their radical demands, however, could not find full support as in the draft 1992 Constitution negotiation process, conservatives widely opposed the inclusion of human rights as natural rights. Eventually, human rights provisions were mainly integrated into the category of citizen's rights. Notably, similar approach exists not only in the constitutions of some former USSR states but also in the socialist or (post-) socialist states in Asia.

Contemporary human rights theory in Uzbekistan is mainly reflected in publications from the state-supported National Human Rights Center, and can be basically explained in the following two ways:

a) a persisting argument that human rights fall entirely into the state's internal matters;

b) a strong association with the right to development (of the nation).

These notions typically represent a classic example regarding 'Asian human rights' and its close theoretical ties to the third generation of human rights. It subsequently raises scholarly debates between supporters of the complementarity theories and those who oppose the third generation of human rights or cultural relativism. As the government often seeks to approach the human rights concept by actively relying on Asian (Oriental) values and supreme national development interests, it often utilizes an interpretation that in order to achieve developmental goals with particular national characteristics, sacrificing individual freedoms or restricting particular human rights is unavoidable. This claim for development influences the degree of democracy and the rule of law, which in contemporary Uzbekistan is mainly associated with the importance of strong rule by a dominant leader aimed at achieving good results.

In general, drafting the 1992 Constitution and incorporation of many universal principles is a positive sign of human rights awareness on the part of the government. The 1992 Constitution respects the many international treaties of which Uzbekistan is a signatory party. A set of other fundamental rights, for example, freedom of thought, speech, and opinion have been guaranteed under the provisions of the current constitution as well, however, under the strict control of media initiated by the ex-President Karimov, the exercise of citizens' rights, particularly regarding political freedoms, had often been *de facto* restricted. International human rights watchdogs have also criticized Uzbekistan for the lack of direct effect of human rights provisions in the constitution and conservative approaches taken in the statutes which, eventually limit constitutional rights to a great extent. Since the transition of political power in 2016, the government has been so far signalling to international human rights watchdogs about its awareness and intending commitments to address the country's human rights situation. Coupled with specific practical steps already taken in the domain of human

rights, scholars and practitioners should address the remaining existing problems within the constitutional text. This also needs to involve broader public participation and deliberations. Eventually, for human rights' symbolic existence not only in books but their effective protection in practice, an adequate protection mechanism has yet to come to existence.

References

1927 Constitution of the Uzbek Soviet Socialist Republic [1927 Constitution] (1927).

1937 Constitution of the Uzbek Soviet Socialist Republic (1937 Constitution) (1938).

1977 Constitution of the Union of the Soviet Socialist Republics (1977).

1978 Constitution of the Uzbek Soviet Socialist Republic (1978 Constitution) (1978).

Alimdjanov, Sardor. "A Political Study on the Nature of Mahalla Institution and Its Relationship with Local Government." Nagoya University, 2019.

An-Na'im, Abdullahi. "Human Rights and Islamic Identity in France and Uzbekistan: Mediation of the Local and Global." *Human Rights Quarterly* 22, no. 4 (2000): 906–41.

Baik, Tae-Ung. *Emerging Regional Human Rights Systems in Asia*. Cambridge University Press, 2012.

Barr, Michael D. *Lee Kuan Yew: The Beliefs Behind the Man*. Georgetown University Press, 2000.

Carlisle, D, and Levitin, L. *Islam Karimov: President of the New Uzbekistan*. Vienna: Grotec, 1995.

Cassese, Antonio. *Five Masters of International Law: Conversations with R-J Dupuy, E Jiménez de Aréchaga, R Jennings, L Henkin and O Schachter*. Bloomsbury Publishing, 2011.

Cole, David. "Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens Symposium: Rounding Up Unusual Suspects: Human Rights in the Wake of 9/11." *Thomas Jefferson Law Review* 25, no. 2 (2002–2003): 367–88.

"Compilation on Uzbekistan Report of the Office of the United Nations High Commissioner for Human Rights; A/HRC/WG.6/30/UZB/2," May 2018.

Dailey, Erika. "Uzbekistan: The Human Rights Implications of an Abuser Government's Improving Relations with the International Community." *Helsinki Monitor* 7, no. 2 (1996): 40–51.

Davies, Sarah, and Sarah Rosemary Davies. *Popular Opinion in Stalin's Russia: Terror, Propaganda and Dissent, 1934-1941*. Cambridge University Press, 1997.

"Democratization and Human Rights in Uzbekistan (October 18, 1999) Document No. 7." *Series 3: Basket III Hearings before the U.S. Commission on Security and Cooperation in Europe and Other Selected Congressional Hearings, Reports and Prints* 34 (1999–2000): i–108.

"Doklad o Verkhovenstve Prava, CDL-AD (2011)003rev." Venice, April 2011.

Feldbrugge, F. J. Ferdinand Joseph Maria, Gerard Pieter Van den Berg, and William Bradford Simons. *Encyclopedia of Soviet Law*. BRILL, 1985.

Femia, Joseph V. "Gramisci, the 'Via Italiana', and the Classical Marxist-Leninist Approach to Revolution." *Government and Opposition* 14, no. 1 (1979): 66–95.

Finnis, John. *Natural Law and Natural Rights*. OUP Oxford, 2011.

Hanks, Reuel R. "Religion and Law in Uzbekistan." In *Regulating Religion: Case Studies from Around the Globe*, edited by James T. Richardson, 319–30. Critical Issues in Social Justice. Boston, MA: Springer US, 2004. https://doi.org/10.1007/978-1-4419-9094-5_22.

Harvey, Colin, and Robert P. Barnidge. "Human Rights, Free Movement, and the Right to Leave in International Law." *International Journal of Refugee Law* 19, no. 1 (March 1, 2007): 1–21. https://doi.org/10.1093/ijrl/eel025.

Holovaty, Sergey. *The Rule of Law*. Kyiv: Phoenix Publishing House, 2006.

Human Rights Council. "Report of the Working Group on the Universal Periodic Review (Uzbekistan), A/HRC/39/7," July 2018.

International Partnership for Human Rights. "First-Ever Visit by UN High Commissioner for Human Rights to Uzbekistan," May 2017. https://www.iphronline.org/firstever-visit-by-un-high-commissioner-for-human-rights-to-uzbekistan-20170510.html.

Ismatov, Aziz. "Citizenship Regulation in the Post-Soviet Space; an International Legal Study in Nationality and Statelessness." Nagoya University, 2014. http://ir.nul.nagoya-u.ac.jp/jspui/bitstream/2237/20640/4/ISMATOV%20Aziz_%E5%86%85%E5%AE%B9%E8%A6%81%E7%B4%84.pdf.

Ismatov, Aziz, and Sardor Alimdjanov. "Developmental Trajectory of Mahalla Laws in Uzbekistan: From Soft Law to Statutory Law." *Nagoya University Asian Law Bulletin* Vol.4 (December 2018).

Ismatov, Aziz, and Eliko Ciklauri-Lammich. "Abolishing Capital Punishment in Uzbekistan – Between External Pressure and Pragmatism." *Zeitschrift Für Die Gesamte Strafrechtswissenschaft* 130, no. 1 (2018): 279–302. https://doi.org/10.1515/zstw-2018-0010.

Kaarlo, Tuori. "The 'Rechtstaat' in the Conceptual Field - Adversaries, Allies and Neutrals, Associations" Vol 6, no. Number 2 (2002): 201–14.

Kelsen, Hans. *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*. Journal of politics, 1942.

Kornai, János, and Professor of Economics Janos Kornai. *The Socialist System: The Political Economy of Communism*. Princeton University Press, 1992.

Kozhamberdiyeva, Zhanna. "Freedom of Expression on the Internet: A Case Study of Uzbekistan." *Review of Central and East European Law* 33, no. 1 (January 1, 2008): 95–134. https://doi.org/10.1163/092598808X262542.

Lehner, Oskar. "Respecting Human Rights in Central Asia: Will This Stabilize or Destabilize the Region." *Security and Human Rights* 20, no. 1 (2009): 48–55.

Levitin, L. *Islom Karimov: O'zbekiston Respublikasining Birinchi Prezidenti [Islom Karimov: The First President of the Republic of Uzbekistan]*. Tashkent: Uzbekistan, 1997.

Lillich, Richard B. *The Human Rights of Aliens in Contemporary International Law*. Manchester University Press, 1984.

"Materiali Pervogo Zasedaniya Konstitutsionnoy Komissii," 1991. Gosudarstvenniy Tsentral'niy Arkhiv.

Newton, Scott. *The Constitutional Systems of the Independent Central Asian States: A Contextual Analysis*. Bloomsbury Publishing, 2017.

Oda, Hiroshi. "The Emergence of Pravovoe Gosudarstvo (Rechtsstaat) in Russia." *Review of Central and East European Law* 25, no. 3 (1999): 373–434.

"O'zbekiston Respublikasining Markaziy Davlat Arhivi [Central State Archive of the Republic of Uzbekistan] XII Chaqiriq, O'zbekiston Respublikasining Oliy Kengashining 1992 Yil 8 Dekabrda Bo'lib O'tgan XI Sesssiya Materiallari [11th Plenary Session Materials]." Fond-M-69, N 1, 154, 1992.

Partlett, William, and Eric Ip. "Is Socialist Law Really Dead?" *New York University Journal of International Law & Politics. New York University. International Law Society* 48 (January 1, 2016): 463.

Petrov, V, V Semyonova, and K Shkenev. *Osnovy Sotsial'nogo Gosudarstva [Fundamentals of Socialist State]*. Nizhniy Novghorod: NNGASU, 2016.

"Postanovlenie o Sozdanii Konstitutsionnoy Komissii [Decree on Establishment of the Constitutional Commission]." Verkhovniy Sovet UzSSR, XII Sozyv VS, 2-ya Sessiya, June 1990. F-2454, N6, 7091 62-67. Gosudarstvenniy Tsentral'niy Arkhiv.

Pottenger, John R. "Civil Society, Religious Freedom, and Islam Karimov: Uzbekistan's Struggle for a Decent Society." *Central Asian Survey* 23, no. 1 (March 1, 2004): 55–77. https://doi.org/10.1080/02634930410001711189.

Problems of Communism. Documentary Studies Section, International Information Administration, 1977.

Saidov, Akmal. *O'zbekiston Konstitutsiyasi Tarihi [History of Uzbekistan's Constitution]*. Tashkent: Tasvir, 2018.

Saidov, Akmal, and U Tadjihanov. *Islom Karimov Konstitutsiya to'grisida: O'zbekiston Respublikasining Konstitutsiyasi o'rganuvchilarga Yordam.* Tashkent: Akademiya, 2001.

Smith, Gordon B., Peter B. Maggs, and George Ginsburgs. *Soviet and East European Law and the Scientific-Technical Revolution*. Pergamon Press, 1981.

"Strategiya Deystviy Po Pyati Prioritetnym Napravleniyamhfpdbnbz Respubliki Uzbekistan v 2017-2021 Gogakh." *Strategiya Deystviy 2017-2021* (blog), n.d. http://strategy.gov.uz/ru.

The Constitution of the Republic of Uzbekistan (1992).

Konstitutsionniy Zakon Respubliki Uzbekistan o Konstitutsionnom Sude Respubliki Uzbekistan, ZRU-431 (2017).

"UN Human Rights Comittee, Concluding Observations, Uzbekistan. U.N. Doc. CCPR/CO/71/UZB (2001)," n.d.

"UN Human Rights Comittee, Concluding Observations, Uzbekistan. U.N. Doc. CCPR/CO/83/UZB (2005)," n.d.

Wennerstrom, Eric. *The Rule of Law and the European Union*. Uppsala: lustus Forlag, 2007.

Wiles, P.J.D. *The Political Economy of Communism.* Oxford: Basil Blackwell, 1962. https://www.abebooks.com/first-edition/Political-Economy-Communism-P.J-D-Wiles/30282152421/bd.

Zakon Respubliki Uzbekistan O Vnesenii Izmeneniy v Nekotorie Statyi Konstitutsii Respubliki Uzbekistan, (V chastnosti, Statyi 80, 93, 108 i 109) (2017).

Zor'kin, V.D. "Verkhovenstvo Prava i Pravovoe Soznanie [The Rule of Law and Legal Consciousness]." In *The Rule of Law: Perspectives from Around the Globe*, Francis Neate. IBA, 2009.

【Special Features: Multiple Aspects on Constitutionalism –Asian "Contexts" and its Logic】

Development of Constitutionalism in Mongolia

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Abstract

Mongolia has experienced three socialist constitutions and a liberal constitution. The socialist constitutions were adopted under the influence of the Soviet and significant for the role it played for the independence of Mongolia. However, with the collapse of the Soviet Union, a window of opportunity presented itself and a liberal constitution was introduced. This time, Mongolia imported the liberal constitutional values independently and voluntarily. Constitutionalism, the concept of the limitation of state powers, separation of powers, human rights and freedom, originated in the west and spread all around the world. This paper explores the path of constitutional developments in Mongolia and the effect of the seventy years of socialist legacy to the development of constitutionalism in Mongolia.

Contents

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I. The Constitutions of the People's Republic of Mongolia

After the collapse of Qing dynasty in 1911, Mongolia declared independence, established Bogd Khanate of Mongolia and enthroned the saint Javzandamba as the King of Mongolia. When the Bogd Javzandamba passed away on May 20, 1924, the Central Committee of the Mongolian People`s Party decided to pursue the path of republican government on June 7, 1924. A number of individuals such as the Finance Minister S. Danzan, who sought to establish an independent Mongolian nation, were executed. The death of the Bogd Javsandamba paved the way for the transfer to a republic from a monarchy. Mongolian People`s Republic was founded in 1924.

The involvement and influence of Russian personals in the constitutional drafting process is undeniable. Mr. T. Risulkov, who was the official representative of the Executive Committee of Comintern, organized the work of incorporating provisions of the Russian Constitution into the Constitution of Mongolia.[1] The Constitution drafting committee was headed by Mr. B. Tserendorj and the first Constitution of the People`s Republic of Mongolia was adopted on November 26, 1924. It is important to note that many intellectuals and political leaders of the time attempted to pursue a path of independence from Soviet influence, but most of them became victims of political repression and arrested and executed. In some ways, the first Constitution of Mongolia resembles the Constitution of Japan and Germany. It was partly an imposed constitution by the Soviet, which helped the Mongolian People`s Party to expel the Chinese and White Russian forces.

The Constitution of 1924 is historically significant because it consolidated the independence gained from the Manchu in 1911, dismantled the monarchy and established the People`s Republic of Mongolia. It was the beginning of the events that led to the eventual membership of the United Nations in 1961. The subsequent Constitutions of 1940 and 1960 followed after the Soviet Constitutions of 1936. The three constitutions had many commonalities. They provided for the special role of the People`s Revolutionary Party, created Council of Ministers, periodic elections, guarantee of human rights and freedom. However, with respect to the protection of human rights and freedom, Mongolian socialist Constitutions focused more on the protection of economic and social rights such as the right to housing, the right to work, the right to medical assistance and the right to education rather than the political rights.

[1] The 1924 Soviet Constitution was adopted on January 31, 1924 five days after the Constitution of Mongolia was adopted. However, the Soviet Constitution was largely based on the Treaty on the Creation of the USSR of 1922.

II. The First Democratic Constitution of Mongolia

With the collapse of the Soviet Union in early 1990s, a window of opportunity presented itself for Mongolia to choose the path of development without excessive foreign influence, especially from the two neighboring countries of China and Russia. Both China and Russia had their domestic issues and for a period of time could not exert much of an influence over Mongolian politics. The democratic revolution in Mongolia was inspired by the perestroika in the Soviet Union and comparable revolutions in Eastern European countries. This was a golden opportunity for Mongolia.

From the perspective of constitutionalism, the democratic movement that started in 1990 was the most significant development. A peaceful protest and hunger strike by young people in the streets of the capital city Ulaanbaatar overthrew the authoritarian regime. Seventy years of socialism ended without bloodshed. The price of the peaceful transfer was as such that the former socialist party, the Mongolian People`s Revolutionary Party remained in power albeit with different ideology and agenda.

The first free election for the bicameral parliament was held on July 1990. The People`s Great Khural, (the upper house of the parliament) established with the mandate to adopt a new democratic constitution, started discussing the draft Constitution. Public officials and scholars such as Professor B. Chimid, who was the main person drafted the constitution, were sent to Europe to study the constitutional systems for a short period of time. During the sessions of the People`s Great Khural, there were heated debates over the choice of parliamentary and presidential democracy. After many compromises, it was decided that the parliamentary democracy was the most suitable system for Mongolia. However, due to the compromises made, Mongolia is often referred to as an example of semi-presidential system as the President is popularly elected and enjoys broad range of powers. The first democratic Constitution of Mongolia was adopted on January 13, 1992.

The Constitution upheld the notion of popular sovereignty, provided for a unicameral parliament elected by the people through general elections. The chapter one of the Constitution was devoted to the strengthening of the national security and the independence of the state. It covers issues such as territorial integrity, ban on foreign troop presence, ownership of natural resources, economic security, protection of livestock, fauna and flora, foreign policy, and notably, for the first time in Mongolian history, permitted private land ownership by citizens. For a nation of three million, located between two giant neighbors, the national security and independence of the state is undoubtfully an important priority. Many Mongolian scholars agree that the parliamentary system strengthened the independence and sovereignty of the country.

The second chapter guarantees the human rights and freedom of citizens, but protection of human rights can be found in other chapters as well. International human rights treaties are binding as the Constitution states that the international treaties are as effective as the domestic legislation upon ratification or accession.[2] The Constitution introduced some restrictions on the rights and freedoms such as private ownership of land. Generally, individual rights are limited by the rights and freedoms of other citizens.[3] However, freedom of conscience and religion, right not to be subject to torture etc. cannot be restricted even in the event of emergency and war.

The third chapter is on the state structure. As mentioned earlier, a major debate during the drafting phase was the choice of parliamentary and semi-presidential system. Even today some still argue that Mongolia is a semi-presidential system due to the powers allocated to the President. Executive, legislative, and judicial powers allocated to different institutions for the first time in Mongolian history with a proper checks and balances. Under the previous Constitutions, the power of the state was concentrated in the ruling party.

The fourth chapter regulates the administrative and territorial units of Mongolia and their governance while the chapter five is on Constitutional Tsets (court) of Mongolia. The last chapter on the amendments to the Constitution provides for special procedures of constitutional amendments and certain restrictions to prevent arbitrary constitutional changes and preserve stability.

III. 2000 Amendments

In 2000, seven provisions of the Constitution were amended. They were immensely controversial even to this day. Professor B. Chimid called them seven worsening amendments. First, these amendments were stuck down by the Constitutional Tsets on the basis of procedural grounds. By the way, it is worth to mention that the previous Constitutions did not have a constitutional amendment procedure, which made it possible for the Mongolian People`s Revolutionary party to amend the Constitution whenever it deemed necessary. The 1992 Constitution provides for a rigid requirement of three fourth majority support for constitutional amendments. However, when coupled with the plural electoral system that produces two party system, it is not as stringent as it looks.

In 1999, seven constitutional provisions were amended. The Tsets stuck them down as unconstitutional based on the fact that the legislature did not seek the opinion of the Tsets as required

[2] Constitution of Mongolia, 1992, art. 10.

[3] Ibid., art 19.3.

by the Constitution. Later, the State Great Khural passed exactly the same amendments in 2000, which remain controversial till today. A dispute has been initiated by the Tsets on the constitutionality of these amendments as of now. Clearly, there was a need for a detailed procedure for constitutional amendments. As a result, in 2010 the State Great Khural adopted the Law on Constitutional Amendment Procedure. The law not only stipulates rather detailed amendment procedure, but also created many eternal clauses or unamendable clauses, which are not stated in the constitution. The law proved to be useful later in 2019 as it required the parliament to follow certain procedures to ensure the public participation. However, because of too many eternal clauses, the State Great Khural had to amend the law so that it can make changes to come constitutional provisions.

The seven amendments included simultaneous mandate that allowed a member of parliament to serve as a minister,[4] the constitutional requirement to have the Prime Minister candidate approved by the President,[5] limitation on President`s involvement in the formation of the cabinet,[6] appointment of the Prime Minister by open ballot,[7] election of Vice-Chairman of the State Great Khural from each party and coalition group of the parliament,[8] reduction of the number of days for a regular session of Parliament from 75 to 50 working days,[9] and dissolution of the State Great Khural by the President if it fails to appoint the Prime Minister within 45 days from the submission of the proposal. Although many call these amendments as worsening seven amendments, the author claims that some of these amendments were actually useful. For instance, the amendments that limited the Presidential powers in the appointment of the Prime Minister and the formation of the cabinet helped to resolve the gridlock between the President and the Parliament. Mongolian Presidents often acted in line with their political party and when the President was elected from the opposition party it created a confrontation between the State Great Khural and the President over the appointment of the Prime Minister. Between 1996-2000, the President Bangabandi rejected Prime Ministerial candidate from the opposing party seven times.

One amendment that especially contentious was the simultaneous mandate, which allowed members of the State Great Khural to concurrently serve in the cabinet. Original provisions of the

[4] Constitution of Mongolia, 1992, art 29.1.

[5] Ibid., 33.1.2.

[6] Ibid,, 39.2.

[7] Ibid., 27.6

[8] Ibid., 24.1.

[9] Ibid., 27.2.

1992 Constitution prohibited simultaneous mandate, but in practice members of the Parliament served as ministers until 1996 when the Constitutional Tsets concluded that members of the Parliament cannot serve as ministers in the cabinet. If a member of parliament has to resign in order to become a minister, it could create a lot of cost for the ruling party as it might lose a seat in the election. This situation led to the 2000 amendment that allowed simultaneous mandate. Some criticized it and suggested that no member of the State Great Khural should serve in the cabinet as ministers or the Prime Minister. Others opted for a limited number of parliament members to serve in the cabinet.

IV. 2019 Amendments

On November 14, 2019, the State Great Khural amended nineteen provisions of the Constitution. This time the amendment process differed significantly from 1999. The whole process took 3 parliaments, 4 draft amendments while in 1999 the Constitution was amended with a short public notice of a day. It all started with the organization of so-called deliberative polling for Constitutional amendments held in April 2017. About 700 citizens randomly chosen from different parts of the country gathered in Ulaanbaatar for two days and made informed decisions on the draft Constitutional amendments. A number of significant proposals were dropped after this event due to lack of support among the participants. Notable ones include the proposals to establish a bicameral parliament and the election of the President by the State Great Khural, which did not receive enough support among the participants of the poll. The deliberative polling was significant as this laid down the scope of the constitutional change. This has established a precedent that any future constitutional amendments need to go through the same process and define the scope of the proposed change first.

The amendments went through deliberations at three plenary sessions of the State Great Khural. After two sessions, the amendments were submitted for referendum. However, the President vetoed the bill due to number of provisions that sought to limit presidential powers. The State Great Khural accepted the veto and proceeded to the third parliamentary deliberation and dropped the idea of constitutional referendum. Meanwhile a committee, tasked with building consensus over the proposed amendments headed by the President, was established. The result of the compromise saw the initial draft changed significantly.

The 2019 Constitutional amendments cover 19 provisions and focused on improving the separation of powers either horizontal and vertical ways. The amendments can be categorized into four groups: the amendments to strengthen the parliamentary democracy and the popular sovereignty;

promoting stability of the executive; guaranteeing the judicial independence; and clarifying local government system. Most of these amendments will be effective by May 25, 2020.

1. Strengthening the Parliamentary Democracy and the Popular Sovereignty

To strengthen the parliamentary democracy and the popular sovereignty 7 constitutional provisions were amended.[10] Several constitutional amendments of 2000 were reversed and the original provisions of the 1992 Constitution were restored.[11] Ordinary laws will be passed by a majority vote of all members of the State Great Khural as opposed to the majority of the members present in a particular plenary session.[12] In other words, the laws will be passed by at least 39 members of the State Great Khural whereas in the past it required the vote of 20 members. Another amendment provides for recall of members of the State Great Khural who violated the law and the oath to the office.[13]

Although political parties had been mentioned in the Constitution, this time the principles with respect to the creation, financing, and the transparency of financial sources and expenses were stipulated. According to these amendments, a political party is the expression of the political will of the people and shall pursue a policy of national level. The internal organization of a party shall confirm to the democratic principles. At least one percent of the voters shall associate in order to establish a political party. This last provision means that in order to establish a new political party, the party must have at least about twenty thousand members or supporters. The amendment was proposed by the President. Twenty thousand registered members` requirement could potentially limit the freedom of association of the citizens. Fortunately, during the deliberation it was mentioned that this requirement means supporters rather than registered members. In addition, the Law on the Procedure to Implement the Amendments to the Constitution of Mongolia, stipulated that this provision shall be effective starting from 2028.

As for the election, the proportionality electoral system was found to be unconstitutional by the Constitutional Tsets. The initial draft contained a proposal to reintroduce the mixed system with a proportional element, but it did not get enough support at the parliament. Instead, the amendment prohibited adoption of, and amendment to the Election law of the State Great Khural one year prior to

[10] Constitution of Mongolia, 1992, art 27.2,6,7; 29.3; 22.2,3,4; 28.2; 21.4; 26.1; 25.1.16.

[11] Ibid., 27.2 Regular sessions of the State Great Khural is held once in every half year for not less than seventy-five working days.

[12] Ibid., 27.6.

[13] Ibid., 29.3.

the regular election. In 2016, the State Great Khural had to make changes to the electoral legislation just before the parliamentary election because the Constitutional Tsets found the proportional system unconstitutional. It is not clear how to proceed if similar situation occurs in the future.

By far one of the most controversial amendment in this part is article 6.2, which was proposed by the President. It states that the land subsoil, forest, water resources and fauna shall be `*State public property*`. The justification presented by the President is that under the State property regime, the mining resources are used irresponsibly by the authorities. State public property would connote that it belongs to the public and reinforces the principle of popular sovereignty. The same provision established National Resource Foundation, presented the principles for the sustainable use of subsoil resources, and stipulated that the majority of the benefits from the use of mining deposits of strategic significance shall be allocated to the people.

2. Stability of the Government

For stability of the Government, the 2019 amendments made significant improvements. Simultaneous mandate was limited so that only four members of the State Great Khural can serve in the cabinet concurrently. The Prime Minister obtained the right to appoint and dismiss members of the cabinet and the President and the State Great Khural can no longer explicitly influence the formation of the cabinet. The Government can now only be dismissed with a majority of the all members of the State Great Khural.

The Presidents can be elected for a term of four years and re-elected only once under the 1992 Constitution. However, the new amendments state that the President can only be elected once for a term of six years. Re-election of a sitting President depends on the nomination by his political party. This necessitates him being biased during his office. Therefore, the drafters believed that the new amendment would provide conditions and incentive for the President to be impartial and neutral in his office. One issue that could be controversial is whether the current sitting President can be elected again under the new amendments.

3. Judicial Independence

In the past, Mongolia has experimented with different variations of the Judicial General Council. At a different point of times, it was under the influence of the Ministry of Justice or the Supreme Court or the President. It is apparent that in order to fulfill its obligation under the Constitution to ensure the impartiality of judges and independence of judiciary, the Judicial General Council itself needs to be

independent in the first place. Under the Constitution the Judicial General Council has duty to select judges from exclusively amongst lawyers, protect their rights, and other matters pertaining to providing the conditions that guarantee the autonomous functioning of judges. The President has the authority not only to appoint judges, but also the members and the chairman of the Judicial General Council, which is often criticized as it gave too much power to the hands of the President.

The new amendments aimed to lessen and eradicate the political influence over the selection of judges. Therefore, it increased the members of the Judicial General Council to ten and limited the terms of office for four years. Under the new amendments, the chairman is to be elected amongst the members by the Council rather than the President. The Judicial Disciplinary Committee will be established independently from the Judicial General Council. The new amendments will serve to limit the undue political influence in the judiciary that has long been an issue in Mongolia.

4. Local Government

Amendments to article 57.2 created national level and municipal level cities. Administrative and territorial units will only have the duty to deliver state services to the citizens while the cities and villages will provide utility services. State power is more decentralized in the local municipalities. Aimag, soum and district Khurals can now collect taxes within the limits prescribed by the law.

V. Conclusions

Between 1924-1990, Mongolia was under the Soviet influence. The three constitutions in these periods were socialist constitutions as the Soviet aimed to transform Mongolia into a true socialist republic. However, these constitutions paved the way for Mongolian independence and served historical roles for the benefit of Mongol nation. Since early 1990s, radical transformation to the liberal constitutional democracy began. Popular sovereignty, separation of powers, protection of human rights and freedom, judicial review of the constitutionality of the legislation were the fundamental principles of the 1992 Constitution of Mongolia. Despite spending 70 years under the Soviet influence, 1992 Constitution was a success. The 1992 Constitution has created a vibrant civil society, free media, and played a vital role in establishing a system of government based on a separation of powers. However, many challenges emerged in the past 28 years. Constitutional amendments of 2000 and 2019, both sought to address these challenges and stimulated the deepening of the development of constitutionalism in Mongolia.

【Special Features: Multiple Aspects on Constitutionalism –Asian "Contexts" and its Logic】

[Research Comments] Paradigms of Analysis in Post-Soviet Constitutionalism

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Contents

This paper is a commentary to the papers resp. to the presentations by William Partlett ("Former USSR trends: State-building and Constitutionalism in the Former Soviet Region"), Anna Gritsenko ("Cases from Russia: Revision of International Law by the Constitutional Court of Russia: When It Was Not Possible to Reconcile International and National Law"), Aziz Ismatov ("Cases from Uzbekistan: The Introduction of Modern Constitutionalism in Central Asian Post-Socialist Context – Constitutional Debate and Development on Human Rights in Uzbekistan in the 20th and early 21st Century"), and Gangabaatar Dashbalbar ("Development of Constitutionalism in Mongolia") in Session 3: "Constitutionalism in Eurasian Transitional Countries".

In the following, we will use the term "post-Soviet space". This includes not only the states that have issued from the former Soviet Union but, as a matter of convenience, Mongolia as well. It is true

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that socialist Mongolia was a formally sovereign state, whereas the republics of the USSR were not. But materially, Mongolia had to obey orders from Moscow just as much as the local leaders in Soviet Central Asia had. After all, it was only a matter of chance and not of concept that during World War II Mongolia did not share the fate of Tuva and could maintain its formal independence instead of being incorporated into the sham federalism of the USSR. The proper position of Mongolian statehood during the Soviet period is discussed under point 2.2.

I. Tool of Analysis No. 1: Centralisation and Decentralisation of Political Power

William Partlett presents as his central paradigm to analyse the constitutional developments in the successor states of the USSR the question of "centralisation – decentralisation" of political power. In this sense, centralism means that all or most political power is held by one organ, in (super)presidential systems by one person, the president.

1. Centralism as a Tool of Regional (Post-Soviet) and Global Analysis

William Partlett's underlying assumption equates centralism with a weak constitution and with the absence of a democratic and constitutional culture. In this sense, centralism denotes the potential arbitrariness of the political centre. Here, the question arises whether this assumption is correct. First of all, centralism is the absence of a separation of powers. This, however, is not necessarily identical with a dysfunctional or undemocratic constitution. Democratic constitutional orders in the sense that the will of the people prevails are, at least in theory, well conceivable without a separation of powers. Rousseau's philosophy is just one example. With regards to the post-Soviet space, however, Partlett's assumption is correct: the hypercentralist presidential and superpresidential systems do not only waive with a separation of powers, but they also stifle democracy. Still, if we wish to use centralism as a tool of analysis on a global scale, we have to abstract from post-Soviet specialities and need to bear in mind that there is no logically compelling link between centralism and the lack of democracy.

The same is true for another term Partlett identified in post-Soviet political and constitutional debate: the "strong state". In the post-Soviet space, this strong state is akin to the centralist presidentialism because post-Soviet thinking conceives the strong state necessarily as having a strong man with wide powers at its top. However, ideas of a "strong state" outside the Soviet space show that such ideas do not necessarily advocate the absence of democracy, of constitutionality or even of a separation of powers, as the British ideas of a "strong government" exemplify. Here again, we need to

be aware that what appears to be a truism in the post-Soviet space, i.e. the antidemocratic nature of the "strong state", is a specific regional trait that we will have to abstract from once we use the "strong state" as an analytical topos or tool with a wider geographical scope.

2. The Post-Soviet Space in General

In the post-Soviet space, however, centralism means more than the mere absence of the separation of powers. It means an arbitrary political centre where the tendentially unlimited powers of the strong state concentrate in one organ, in one person. This centralism existed in the Tsarist rule just as it did in the Soviet Union. Centralism is viewed as the "normal" architecture of the state. Insofar, the political identity of that post-Soviet space is centralist. The various successor states use centralism, i.e. their centralist legacy, in various ways.

First of all, there is the "Baltic exception" that Partlett describes. After 1991, Estonia, Latvia and Lithuania chose a decentralised political system and have sticked to it since. However, this exception can be explained easily by the fact that the population of these countries never shared centralism as part of their identity. Even in the period when they belonged to the Tsarist empire and the Soviet Union, they did not stop to be, culturally, a part of Western Europe and its non-centralist culture, a fact which was helped by their Catholic resp. Lutheran traditions which made them look towards the West rather than towards the East. Therefore, the Baltic governments, backed by their peoples in this question, found it easy to adopt and maintain values often labelled as "Western" such as a decentralised political system with a separation of powers and well-protected human rights.

3. The Post-Soviet Space in Particular: Russia

In Russian politics, especially in the Russian dialogue with the west, centralism has turned into a sort of identitarian or even nativist argument. In order to fight off "Western" ideas Russian power-holders argue that Russia has always been centralist, that this is part of Russia's political identity or nature, and that other models would not work in Russia.

Anna Gritsenko exemplifies this Russian self-assertion with view to the role of international law in the domestic hierarchy of sources of law. Although she does not use centralism as a factor of analysis, her description of the case-law of the Russian Federal Constitutional Court and of the accompanying legislation can be read as a story of re-centralisation. Both the Tsarist empire and the Soviet Union closed their domestic legal space against international law: it had no role as a domestic source of law. The West has a different tradition. Although the details vary, its legal systems do accept

international law as a source of domestic law. International law as part of the domestic legal system is quite a far-reaching form of decentralisation because the state power accepts that some of the rules valid on its territory are not only not made by the political centre but even by external agents who are under no control of the state, i.e. by the international community. This deprives the centre of controlling a part of the legal system and therefore is a strong case of decentralisation.

After the end of socialism, the Russian constitution enshrined international law as one of the sources of the Russian legal system, and Russia signed the European Charter of Human Rights, thus accepting an external judicial review of its human rights performance. In other words, Russia decentralised its system of sources of law significantly. This was not much questioned in the Yeltsin years, but when Putin came into power, he initiated a programme of recentralisation and of creating the image of a "strong state" (which, however, has remained a very weak state, if one cares to take a closer look). The first years of Putin were dedicated to the recentralisation of the internal power structures. In due course, the Markin case, the Anchugov and Gladkov case and the Yukos case triggered the re-centralisation of the sources of law. It is open to argument whether these cases are the true reason for re-introducing the supremacy of domestic (constitutional) over international law, or whether Putin would have turned against international law anyway.

The result of these and other cases, as well as of the accompanying legislature and the proposed constitutional amendments, is unequivocal. This development puts Russia back into control over how international law operates in the domestic legal space, and it puts Russia back into control over whether decisions by the European Court of Human Rights are executed by and within Russia or not. Formally, at least part of the power is vested within the Federal Constitutional Court. Given the court's obedience to the president's wishes and policy, this re-centralisation materially strengthens the political centre, i.e. the President. The two dissenting opinions in the Yukos case confirm this diagnosis because they had no impact on the court's majority decision. They are the exceptions that confirm the rule.

4. The Post-Soviet Space in Particular: Uzbekistan

The Uzbek development is quite the opposite of Russia. After the end of the of the Soviet Union and its sudden independence, the country started with a superpresidentialism of a degree that Partlett defines it as a "sham constitution". Thus, Uzbekistan started as an extremely centralised political system. However, in recent years, the system started to soften. Some elements of decentralisation were included, first cautiously, quite recently with stronger impacts.

The story of strengthening human rights in Uzbekistan is part of this story of gradual decentralisation. Human rights empower the individual, most importantly vis-à-vis the state. The power that human rights confer upon the individual is lost for the state, i.e. for the political centre, since it can no longer define the individual's behaviour in the sphere protected by human rights. This weakens centralism.

However, Aziz Ismatov shows that this paradigm of decentralisation by strengthening the human rights in Uzbekistan is not entirely unequivocal. Arguments of communitarianism, of "Asian" or "Oriental" values indicate that the state is cautious about the decentralising effect of the human rights and would like to retain at least some leverage to control human behaviour. If one takes a closer look at these Uzbek arguments, as Ismatov does, they do not very much differ from the debate of the possibility of limiting human rights by the rights of others and by other constitutional values that is also common in Western jurisdiction. "Asian" or "Oriental" values thus do not constitute an Uzbek specific but is rather an argumentative strategy to retain some control of the degree of decentralisation that human rights bring about. Still, this does not alter the general tendency of the Uzbek development: where Russia enters on a path of re-centralisation, Uzbekistan dares decentralisation.

5. The Post-Soviet Space in Particular: Mongolia

The principal feature of Mongolia's development is not so much the conflict between centralism and decentralisation but much rather the paradigm of decolonisation, which we will deal with under point 2, especially under point 2.2.

As far as centralism and decentralisation is concerned, this conflict was seen and addressed immediately after the end of the socialist one-party state. The debates of the early 1990ies created as a sort of compromise a mixed system. Subsequent constitutional amendments differ only partly from this basic compromise. The 2000 amendments remain within the paradigm achieved in the early 1990ies. The debates about the incompatibility between a seat in parliament and a seat on the ministers' bench stay well within the balance between a centralist and a decentralised system in force since the early 1990ies.

The tendency of the 2019 amendments has a stronger element of decentralisation. It includes the people as a compulsory element into the constitutional amendment procedure, giving the people a sort of veto power. Apart from this procedural decentralisation, other elements contain a material decentralisation because they strengthen the separation of powers. In this context one can state a remarkable parallel: the uncertainties around the Judicial General Council reflect the negative

experiences of quite a few formerly socialist countries in Eastern Europe with their respective judicial councils.

Coming back to the question of centralism, the 2019 amendments contain at least a formal decentralisation. Whether the popular veto in the constitutional amendment process will lead to a material decentralisation of decision-making by introducing another player, or whether it will centralise the system by opening an avenue to the president to manipulate the people's will and thus strengthen his own control over the process, i.e. whether it will turn into a plebiscitarian pillar of the president's power, is not yet clear and will have to be seen in the future. As far as the law on the books goes, the 2019 amendments are an element of decentralisation.

II. Tool of Analysis No. 2: Decolonialisation as a Central Moment for Both the Former Metropolis and the Former Colonies

1. Decolonialisation as a Tool of Regional (Post-Soviet) and Global Analysis

Next to the paradigm of centralism, I would like to propose another factor of analysis: decolonialisation. William Partlett shortly mentions some of its elements in his paper, but does not use it as a fully-fledged tool of analysis. I would like to propose to do so.

To analyse the developments that the various papers describe under the aspect of decolonialisation does not replace centralism as a tool of analysis. Rather, decolonialisation is another, in a certain way complementary way of analysis. Thus, the two tools do not exclude but complement each other.

And another thing can be said for decolonialisation as a tool of analysis: it opens the way into global constitutional comparison. Centralism, too, is a paradigm used in universal comparison of constitutional systems. However, when one deals with the post-Soviet space, the superpresidentialism we find there leads one to just look at the regional specifics which may make one think, i.a., that centralism and a lack of democracy are identical. These post-Soviet truisms may block the way to relate them to global tendencies, to introduce them into the mainstream of universal constitutional comparatism. This regionalistic danger is much less existent under the prism of decolonialisation.

2. Decolonisation in the Post-Soviet Space

Decolonisation has different effects on the former metropolis and on the former colonies. In the post-Soviet space, we find one former metropolis: Russia as the successor to the Tsarist and Soviet

empire(s). The other states in the region are former colonies. It is true that this concept raises questions with view to the European successor states such as Ukraine, but it certainly holds strong in the Caucasus and in Central Asia including Mongolia. Mongolia formally was an independent country, but factually it was a Soviet colony. Since the Brezhnev doctrine – which Mongolia formally ratified in the preamble of its 1960 constitution – created a status for the satellite states similar to the protectorates of overseas colonialism and since in studies on colonialism and decolonialisation protectorates are treated as colonies in a material sense, one might even formally consider Mongolia to have been in a status of colonial dependency from the Soviet Union.

In the former metropolis, Russia, decolonisation did not affect the state as such. The needs of state-building after 1990/91 were not due to the loss of the colonial empire, but due to the changes necessary after the demise of socialism. Nevertheless, the Russian constitution and Russian law contain numerous provisions which on the one hand deal with the legal consequences of this loss, e.g. in the field of nationality laws, and which on the other hand show that that loss is considered not only a tragedy but also illegitimate, i.e. that Russia claims to have a right to gain back the lost territories. One instrument to do so are the numerous international organisations under Russian control that Moscow created to unify the post-Soviet space.

Anna Gritsenko's paper can be read in this light, too. After the loss of its empire, Russia decided to find its new role in the world by integrating into international structures including international law. Now that the initial shock of being reduced to a middle-power with only a few colonies left is over, Russia reverts to assert its national sovereignty and returns to the idea of the "strong state" which has a meaning not only domestically, but in foreign politics as well: Russia tells the world what to do, not vice versa. Therefore, it is quite logical to stop the high position that international law enjoyed in the Russian legal system. From now on, Russia will apply international law to the extent it thinks it fit, and not to the extent international law claims to be applied.

In this, one might find an interesting parallel with the Brexit. After having lost its colonies in the 1950ies and 1960ies, Great Britain had to redefine its new role in the world. The Commonwealth of Nations, NATO membership and the much-quoted "special relations" with the US mitigated the disorientation but were insufficient for the country to find a new role. In this situation, Britain entered the European Community, as the European Union was called in those days. Now that this post-decolonisation shock and disorientation seem to be over in Britain, the country feels it no longer needs the EU membership to define its role in the world, and thus it decides to leave the EU.

The former colonies in the post-Soviet space had to engage in state-building which was all the more difficult because the end of the Soviet Union and state independence had come quickly and unexpectedly. Some countries such as the Central Asian republics of the USSR had to engage in a parallel effort of nation-building as well. Although state-building as a challenge was similar in the former colonies, its details were starkly different. The former Soviet republics had an insufficient state apparatus because of Moscow's strategy of direct rule in Central Asia and therefore they had to start quite from scratch. Mongolia, on the other hand, profited from having been a formally independent country so that it did not have to build institutions from zero but "merely" had to reorganise the existing ones and to create those that the old system had not had, e.g. a Constitutional Court. This difference may explain why the former Soviet republics opted for a centralist or even hyper-centralist system. Such a system is constructed more quickly and more easily and thus fills the vacuum of decolonisation in a way that may seem advantageous in the moment of gaining independence. Mongolia, on the other hand, could indulge in the "luxury" of debating about centralism and of opting for a compromise that resulted in a mixed system.

Under the paradigm of decolonisation, Aziz Ismatov's paper on Uzbekistan can explain why human rights came to that country quite lately. Only when the state was felt to be sufficiently consolidated by hypercentralist policies could one venture to decentralise it by opening to human rights. This is not necessarily in line with decolonisation strategies in other parts of the world where endeavours to strengthen the human rights of the local population were used to reduce the influence of the colonial power; Gandhi's fight for India's independence is an example for such a strategy. However, in Uzbekistan, there was no movement for decolonisation prior to the sudden independence, and after independence state-building took priority over human rights. Only recently was this prioritisation put into question.

Mongolia is a state with few inhabitants and a vast territory locked in between the big neighbours Russia and China. Understandably, independence in the sense of a material sovereignty from the neighbours is a predominant feature in Mongolia's constitutional development. Mongolia tried to move from dependence to independence. It is not by chance that the paper of Gangabaatar Dashbalbar defines the end of the Soviet Union as a "window of opportunity" for Mongolia and its material independence. The special features of Mongolia's protectorate-like statehood before 1990 constitute a framework different from the Central Asian Soviet republics. The latter group had to see to a very quick state-building, sometimes accompanied by the necessity of nation-building. Mongolia needed

neither, but could limit itself to reforming the existing state structures. Insofar, Mongolia is more comparable to the former Soviet satellites in Eastern Europe than to its Central Asian neighbours.

III. Conclusion

Under both paradigms of centralism and decolonisation it is difficult to identify genuinely "Asian" features.

All political systems have to define to what degree they wish to be built on centralism, and to which extent they want to decentralise. One may say that "Western" systems put more trust into decentralised solutions whether Asian states prefer centralised systems. Yet, the delimitation between the two is far from equivocal but is vague and blurred, in practice mixed systems are more common than dogmatically "pure" ones, and in many states the degree of centralisation and decentralisation is a question of continuous political debate. The unending rebalancing between the federal and the state level in the federal systems of the world is just one example for the fact that the degree of centralism is rarely fix but open to constant discussion and political bargaining.

The same is true for the extent of decentralisation that human rights bring about. The communitarianism of the "Asian" or "Oriental" values of the Uzbek debate on human rights are merely a label for debates which every political system faces that respects human rights as viable rights and not just as a façade. In every such system the human rights have to find their place in the triangle individual – society – state, and how individual human rights (and duties) are limited with view to the rights of others and to other constitutional values is a question that all these systems have to answer on a day-to-day basis. The bulk of the case-law of the German Federal Constitutional Court, just to give one example, is on how to draw these limits in individual cases and in abstracto.

In the question of decolonisation, we can find even less specific "Asian" elements. The individual features of the situation of any given country before, during and after decolonisation are much more important than any geographical or cultural belonging of that country. This is clearly shown by the Russian, Uzbek and Mongolian examples. If we were to widen the analysis to other post-Soviet and post-socialist countries this finding would be confirmed.

Still, even if we cannot find much of genuinely "Asian" features, we can establish striking similarities in the post-Soviet and, more broadly, in the post-socialist space. These spaces are not limited to Asia, but range from European Minsk and Yerevan (post-Soviet) or Prague, Tirana and Sofia (post-socialist) as far as Asian Ulaanbaatar and Vladivostok. The common recent past and the

sometimes comparable and sometimes individual strategies of overcoming its various legacies still allow to define this space as a unit which makes the application of certain tools of analysis both possible and meaningful.

And another thing becomes clear from the papers resp. presentations of this panel. The "transition" of the post-socialist space is more or less over. Although not all of the problems inherited from the past are solved, the new systems are now consolidated to an extent that the adjective "transitional" sounds wrong. Russia's new self-assertion, expressed by a re-centralisation and a "strong state" in foreign relations, just as well as Uzbekistan's more relaxed stance on decentralisation by human rights and Mongolia's readiness to experiment with degrees of centralism and decentralisation show that the systems as such are no longer perceived to be in a transitional, pending and therefore fragile state. This does not mean that no more reforms are necessary. The necessity to reform is acknowledged in the post-socialist countries, too. But these are now reforms in established systems and no longer in the abeyance of a more or less undefined (and perhaps undefinable) in-between space between systems. So, in order to define this geographical-cultural area, "post-Soviet" or "post-socialist" – as the case may be – is more appropriate than "transitional".

個別論題

Thematic Papers

【Translated Article】

Constitutional Control in Uzbekistan: Current State and Development Perspective*

GAFUROV Askar**

Abstract

This article looks into potential ways to improve constitutional control and increase its effectiveness. The research subject focuses on the legislative foundations of constitutional justice in Uzbekistan, particularly on the essence of constitutional control and legal mechanisms of its implementation. The article indicates the disadvantages and problems of the implementation of constitutional control in Uzbekistan. Author notes that the constitutional control of Uzbekistan is rooted in the European model of constitutional justice, but it needs further improvement of its mechanism. In order to analyze the current condition, the author briefly shows the formation history of constitutional control. Analysis of the current state results in the following observations; First, Constitutional Court needs to improve its legal framework and the practice of exercising constitutional control. Second, the absence of the constitutional complaint makes constitutional review ineffective.

This paper also examines the possibility of introducing a constitutional complaint that would grant citizens and legal entities the right to apply to the Constitutional Court. The author claims that careful consideration of foreign experience is of particular importance while introducing a constitutional complaint.

The article describes the specifics of constitutional complaint's application. It proposes an individual complaint's admissibility after a lower-level court has issued a judgement in a case dealing with allegedly violated citizens' constitutional rights. The author recommends a preliminary examination of citizens and legal entities complaints and a specific time limit for lodging complaint. It is proposed to abandon the preliminary

* This article is an English translation. It was originally published in Russian in https://inscience.uz/index.php/socinov/article/view/152

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questioning practice by judges of the Constitutional Court and authorize the Court's structural divisions to analyze complaints and verify their admissibility. Mentioned novelties aim to improve constitutional control, increase its effectiveness in ensuring constitutional legality and protecting citizens' fundamental rights and freedoms.

Thus, the proposed adoption of the new constitutional law on Constitutional Court of the Republic of Uzbekistan in the new edition will strengthen constitutional control, constitutional legality, improve constitutional proceedings, and, ultimately, effectively protect citizens' rights and freedoms.

Conclusion sheds light on reasons for constitutional control's ineffectiveness and offers proposals for its improvement in the form of a constitutional complaint, and its admissibility criteria.

Contents

I. Introduction

Uzbekistan's constitutional control has a task to ensure the Constitution's supremacy and laws, ensure constitutional legality. In a broad sense, the constitutional review can be exercised by the President, parliament, government, courts of general jurisdiction, the ombudsman, justice and prosecution authorities, and other competent law enforcement agencies. The constitutional control analyzed in this article refers to a special judicial body of the Constitutional Court of the Republic of Uzbekistan (hereinafter, the Court).

Scholars pay considerable attention to the evolution of constitutional control in many countries, including in the CIS. Notably, the formation and development of constitutional control in Uzbekistan follows general CIS tendencies within statehood formation in the post-Soviet space.

Research on the development of constitutional control in Uzbekistan has not yet received sufficient academic attention. The state and development of constitutional control in Uzbekistan is addressed in scientific articles of academician A.Kh.Saidov, [1] B.Sh. Mirbabaev, [2] O.Z.

[1] Саидов А.Х. «Контроль за конституционностью нормативно-правовых актов законодательной и исполнительной власти – важный механизм защиты прав и свобод человека».//Ҳокимият тармоқларини тармоқларини бўлиниш принципина

Mukhamedzhanov.[3] Apart from the mentioned authors, the constitutional review has not become the subject of serious scientific analysis. Some authors have covered the issue[4] in the framework of their research on constitutional courts' practice in post-Soviet countries.

Russian scientist O.V. Brezhnev,[5] and assistant professor of Nagoya University of Japan A. Ismatov[6] devoted their articles directly to constitutional control's analysis.

The study of constitutional control offers a closer look at its essence and provides fresh perspectives to assess constitutional justice implementation and identify legal gaps objectively.

Modern constitutional control's developmental trends necessitate taking a closer look at the issue to expand its democratic settings (i.e. constitutional complaint) in protecting human rights, and increase the role of Court in ensuring constitutional legality.

Currently, the parliament considers adopting a new Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan" and introducing a constitutional complaint. In this regard, it is necessary to research the current state of constitutional control, identify future directions for its development, in the context of the forthcoming expansion of the Court's authority.

This article is devoted to the study of constitutional judicial review and aims to demonstrate the reasons for inefficiency and identify promising directions for improving the Court. The research is based on the Constitution's norms, the Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan", and academic articles of domestic and foreign scientists-constitutionalists.

II. The Current State of Constitutional Control

Analyzing the formation of the system of constitutional control, Professor T.Ya.Khabrieva (Russia), claims that "The constitutional reform gave impetus to the practical functioning of

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амалга ошириш ва инсон ҳуқуқларини ҳимоя қилишда конституциявий суднинг роли: Ўзбекистон ва хорижий мамлакатлар тажрибаси: халқаро илмий-амалий конференция материаллари. – Т.: Baktria press, 2016. С.37-43.

[2] Мирбабаев М.Ш. «Компетенция Конституционного суда Республики Узбекистан». Вестник Конституционного суда Республики Узбекистан. Выпуск 3. Ташкент. 1999. С.83-86.

[3] Мухамеджанов О.З. «Судебно-правовая реформа и развитие конституционного правосудия в Республики Узбекистан». Журнал «Государство и право». 2018, №2, 84-92.

[4] Арутюнян Г.Г. Конституционный контроль: характер функционирования и характер развития системы. Монография. - М., 1997.; Нечкин А.В. Органы конституционного контроля стран СНГ: порядок формирования и компетенция. //Научный ежегодник Ин-та Философии и права Урал. отд. Рос. акад. наук, 2018. Т.18, вып.4, с.75-96.; Гордеев И.В. Конституционная юстиция в государствах-членах СНГ. Автореферат диссертации на соискание ученой степени кандидата юридических наук 12 00 02 - конституционное право; муниципальное право. М.: Московский университет МВД России. 2007. 22 с.

[5] Брежнев О.В. «Развитие института конституционного правосудия в Республике Узбекистан: проблемы теории и практики». Вестник Томского государственного университета. 2020. № 451. С. 185–195.

[6] Ismatov Aziz. «The Constitutional Judiciary and its Role in the Democratization Process in post-Soviet Central Asia. The Constitutional Court in Uzbekistan». http://cale.law.nagoya-u.ac.jp/_userdata/alb5_01_Aziz.pdf. (Дата обращения 28.09.2020)

structures designed to carry out these functions, and entailed the establishment of new ones." [7] Nowadays, constitutional review exists in 164 out of 193 countries, of which 74 implement a European constitutional review model. [8] In particular, almost all post-Soviet republics have designed their constitutional courts according to the European model.

The constitutional control in Uzbekistan emerged after the collapse of the USSR and obtaining independence. It is particularly associated with adopting the 1992 Constitution of Uzbekistan and gradual transition from a quasi-judicial body - the Soviet Committee of Constitutional Review towards the Constitutional Court.

The Constitution integrates the Court within the judicial system. As a special judicial body, the Court expected to ensure the Constitution's supremacy and its direct effect. The Constitution determines the Court's status and guarantees its independence.

President of Uzbekistan initiated cardinal changes in the judicial and legal system and thus, paved the way for a new stage in constitutional control's development. Within the so-called '2017-2021 Action Strategy for Uzbekistan's development', fundamental judicial and legal reforms fall into one of five priority areas. This *interalia* has resulted in the constitutional amendments of articles 80, 93, 108 and 109, which govern constitutional control effectiveness.

Following constitutional amendments, parliamentarians adopted a new version of the Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan". The law contains several new provisions, the implementation of which guides a current state of constitutional control. This law was adopted as a Constitutional Law. Such a status increases enormously the Court's status and significance within the frames of the public system. From now on, the Court's judges are elected by the Senate upon the President's proposal. In turn, this proposal stems from the list of judges issued by the Supreme Judicial Council. Thus, apart from Parliament and President, there is a new specialized body – the Supreme Judicial Council that pertains authority to participate in the process.

Court's judges elect the Chairman of the Court and his deputy among themselves at one of its sessions. This practice certainly reinforces the principle of judicial independence and autonomy. Previously, the President enjoyed uncontested authority to nominate judges.

Constitutional courts' practice in foreign countries imposes higher requirements on judges of the constitutional courts. Considering this, the new law has increased the age limit for judgeship

[7] Хабриева Т.Я. Избранные труды: в 10 т. Т. 2: монографии. Содерж.: Конституционный контроль. Правовая охрана Конституции. Теория современной конституции. – М., 2018. 448 с, p.14.

[8] Арутюнян Г.Г. Конституционный контроль: характер функционирования и развития системы. Монография. – М., 1997. 197 с.

candidates from 30 to 35 years. A citizen of the Republic of Uzbekistan at least thirty-five years old from among specialists in politics and law, who has high moral qualities and the necessary qualifications, can be elected as a Constitutional Court judge.

It is not necessary to have legal education to become a judge of the Court. On the other hand, there was no single case when parliamentarians elected judge from among the experts in politics. Foreign practice demonstrates similar tendencies. For example, in Germany, "the Federal Constitutional Court is a purely legal court".[9] A judge of the Constitutional Court of the Czech Republic can be appointed from among the citizens with higher legal education and relevant law expertise for at least ten years.[10] In Korea, Spain, Italy, Serbia and Croatia, legal education is also a prerequisite for holding a judicial position.

The law stipulates that the same person cannot be elected as a judge of the Court more than two times. The maximum age for a judge's position is 70. Such limitations are consistent with the practice of foreign constitutional courts.

The range of eligible parties entitled to submit issues to the Court has been expanded recently and now includes the Cabinet of Ministers and the Commissioner for Human Rights of the Oliy Majlis of the Republic of Uzbekistan (Ombudsman). Hence, currently, the following subjects have the right to submit issues to the Court: the Legislative Chamber of the Oliy Majlis; Senate of the Oliy Majlis; President of the Republic of Uzbekistan; The Cabinet of Ministers; Commissioner of the Oliy Majlis for Human Rights (Ombudsman); Jokargy Kenes of the Republic of Karakalpakstan; a group of deputies - at least one-fourth of the total number of deputies of the Legislative Chamber of the Oliy Majlis; a group of senators - at least one-fourth of the total number of members of the Senate of the Oliy Majlis; Supreme Court; Attorney General. A question for consideration by the Constitutional Court may also be submitted on the initiative of at least three judges.

Expanding the circle of subjects who have the right to submit an issue to the Court is undoubtedly a positive norm that aims to expand access to constitutional justice.

The Constitutional Court of Uzbekistan is a constitutional control body oriented towards implementing subsequent control (ex-post). Simultaneously, with the new law's adoption, preventive control (ex-ante) has been partially introduced. The law entrusts the Court to determine the constitutional compliance with constitutional laws, laws on the ratification of international treaties - before their signing by the President of the Republic of Uzbekistan. Thus, recent

[9] Конституционный контроль в зарубежных странах: коллективная монография. Под ред.: Е.А.Павлова, Е.А.Кремянской. – М.: МГИМО-Университет, 2015. 341 с, p.14.

[10] Ibid, p.36.

legislative novelties introduce a new form of constitutional control - preventive control over the constitutionality of constitutional laws and laws on international treaties' ratification.

It should be noted that preventive control is a new form of control, and its implementation raises several issues.

The law stipulates that the President must sign and promulgate the law within thirty days. According to the Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan", the Court begins to study the issue no later than seven days, and the decision on the issue is taken no later than three months. The legislative norms governing the timing of adopting a decision by the Constitutional Court should be synchronized with the signing and promulgation of laws by the President.

The Constitutional Court also considers appeals of the Supreme Court, that originate in specific cases of lower courts regarding the compliance of the normative legal acts applied in particular cases with the Constitution. Previously, this right belonged to the Chief Justice of the Supreme Court only. Considering this body's collegial structure, such a right is vested with the Plenum of the Supreme Court.

The law prescribes that the Court, based on the generalized results of the constitutional proceedings practice, annually submits information on the state of constitutional legality in the country to the chambers of Parliament and the President of the Republic of Uzbekistan. It should be noted that such an informative function is a legislative novelty. Ensuring constitutional legality is a system of measures aimed at preventing violations of constitutional legality.

One of the important guarantees of the Court’s independence is related to its financial framework. The law provides that the financing of the Constitutional Court activities is carried out at the public budget expense and is provided for in a separate line.

III. Prospects for the Development of Constitutional Review

The constitutional review in Uzbekistan is still far from being perfect. Certain problems hinder the implementation of effective constitutional review. Such problems include the passiveness of the constitutional control subjects, the absence of a constitutional complaint, and the imperfection of legal mechanisms for implementing constitutional control.

Assistant Professor of Nagoya University A. Ismatov (Japan) asserts that “a closer look at the modern system of constitutional control in Uzbekistan, especially at its static condition,

demonstrates serious concerns about the issue of protecting fundamental rights and promoting democracy".[11]

This situation actualizes the issues of further improving the activities of the Constitutional Court. Currently, a new draft Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan" stipulates the expansion of the Court's authority in the form of increasing the number of eligible parties that have standing to bring complaints, and the introducing constitutional complaint.

Such tendencies aim to ensure effective protection of human rights and freedoms, determine the use of various forms of citizens' access to constitutional justice. The constitutional complaint is an effective instrument for guaranteeing the protection of constitutional rights and freedom of citizens. Undoubtedly, empowering citizens and legal entities with the right to submit an issue to the Court is an important step in democratizing society.

Introduction of a constitutional complaint may indeed become an important step towards strengthening constitutional justice.

The experience of foreign countries clearly shows that constitutional review without constitutional complaint cannot be effective. Professor V. A. Kryazhkov (Russia) rightly noted, "the presence of such a procedure largely determines the meaning of the existence of the Constitutional Court, and, on the contrary, its absence would noticeably devalue constitutional justice".[12]

The essence of a constitutional complaint lies in a citizen's right to check the constitutionality of a law that allegedly violates his rights and freedoms. At present, citizens have indirect access to constitutional justice by appealing to competent entities that have standing. Along with this, the Court's proceeding can be initiated if at least three judges of the Court agree with the arguments given in the citizens' appeal. In this case, the judges, on their initiative, can bring the issue to the Court's session. However, such initiation and further participation of the same judges in consideration of the same issue conflicts with the principle of judges' impartiality and objectivity. Therefore, the practice of initiating questions by the judges of the Court should be abandoned.

As it is obvious in constitutional courts' practice in foreign countries, many complaints made on formal grounds are inadmissible and unfounded. Therefore, most applications are dropped out at the preliminary stage of a case study. For example, the Federal Constitutional Law "on the

[11] Ismatov Aziz. «The Constitutional Judiciary and its Role in the Democratization Process in post-Soviet Central Asia. The Constitutional Court in Uzbekistan». http://cale.law.nagoya-u.ac.jp/_userdata/alb5_01_Aziz.pdf. (Дата обращения 28.09.2020)

[12] Кряжков В.А. «Российская модель конституционной жалобы». Конституционное и муниципальное право. 2012. №5, с.65-71. С.71, p.71.

Constitutional Court of the Russian Federation" stipulates that the Constitutional Court's Secretariat preliminarily considers citizens' applications. In Korea, the Constitutional Court's President may appoint a group of three judges to the Constitutional Court to preliminary review a constitutional complaint. Based on the preliminary consideration's positive results, the submitted constitutional complaint is then being forwarded to the Court's consideration. In Germany, sub-chambers were created within each chamber of the constitutional Court for preliminary verification of constitutional complaints and deciding on their admissibility.[13]

Another criterion for a constitutional complaint's admissibility is the exhaustion of all available legal remedies. For example, in Lithuania, an essential condition for applying to the Constitutional Court is a requirement to exhaust all instruments of legal protection.[14]

Hence, this paper suggests that a preliminary study of appeals is generally compliant with legal requirements. Certain requirements for the admissibility of a constitutional complaint should be envisaged. In particular, the appeal can be permissible if the law allegedly violates citizens and legal entities' constitutional rights and is being applied in a specific completed ordinary case. A constitutional complaint must be lodged no later than one year from the date of the end of considering the case in the instant Court. So, the end of the case's consideration in the instant court means that the person has used all available legal remedies before applying to the Constitutional Court.

Many countries' experience shows that empowering citizens with such a standing leads to a sharp increase in the constitutional courts' workload. For example, every year, the Constitutional Court of Germany receives more than 5000 applications from citizens,[15] whereas in Russia, about 15000.[16] Meanwhile, a significant part of requests is being dropped out at the preliminary study stage. Thus, in Germany, only about two per cent of complaints received have a chance for further review.

The introduction of the constitutional complaint into the Constitutional Court activities of Uzbekistan will gradually increase its workload. This process will also require establishing clear

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[13] Конституционный контроль в зарубежных странах: коллективная монография. Под ред.: Е.А.Павлова, Е.А.Кремянской. – М.: МГИМО-Университет, 2015. 341 с, p.88.

[14] Aušra Kargaudienė. «Individual Constitutional complaint in Lithuania: Conception and the legal issues». Baltic Journal of Law & Politics. Volume 4, № 1 (2011). https://content.sciendo.com/view/journals/bjlp/4/1/article-p154.xml (Дата обращения 28.09.2020)

[15] Официальный веб-сайт Конституционного суда ФРГ. https://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2019/statistik_2019_node.html (Дата обращение 14.09.2020).

[16] Pan Mohamad Faiz Kusuma. The Role of the Constitutional Court in Securing Constitutional Government in Indonesia. P.39. https://espace.library.uq.edu.au/data/UQ_412310/s4282430_final_thesis.pdf (Дата обращение 28.08.2020).

application guidelines, admissibility criteria, and experienced professionals of the Court's structural units.

It is necessary to empower the Court's apparatus with the right to a preliminary analysis of applications received from citizens and legal entities and verify their compliance with the legislation's requirements.

The Court is a collegial body and all issues related to its authority are considered only at its session with all judges' participation. To make a decision, at least one-quarter of the total number of judges must be present at Court’s session.

The introduction of a constitutional complaint will particularly lead to an increase in judges' workload. This, in turn, will require an increase in the number of judges. In most countries, the number of judges of the Constitutional Court is nine, whereas, in some countries, the number of judges varies from 12 to 19.

The Court's current quantitative composition does not allow to cope with the expected growth of appeals successfully. The application of a constitutional complaint in the Constitutional Court’s practice requires expanding the Court's composition to at least nine judges.

The next topical issue of the development of constitutional review is related to courts of general jurisdiction. The law requires the Constitutional Court to consider the Supreme Court's appeal, initiated by the lower courts, on the constitutional conformity of the normative legal acts in particular cases.

Article 116 of the Civil Procedure Code provides for the lower courts’ obligation to suspend the proceedings before the Constitutional Court issues its decision in individual cases. However, there is no exact algorithm for a judge of general jurisdiction. In other words, there are no well-elaborated circumstances to doubt the constitutionality of a legislative act, the effect of which is decisive for the case in question. The law is silent on how a judge of the first instance should act if there is a doubt about the constitutionality of a normative legal act applied in a particular case. It is unknown whether a judge of an ordinary court should apply to higher authorities or send appeal directly to the Supreme Court? Currently, the Supreme Court's Plenum that guides upon eligibility to submit appeals to the Constitutional Court originating from ordinary courts’ cases. This cumbersome system does not justify itself. Therefore, the courts of general jurisdiction are not inclined to apply to the Constitutional Court.

According to the Indonesian scholar Pan Mohamad Faiz Kusuma, “… if ordinary court judges doubt the constitutionality of laws and regulations relevant to the case, they can refer to the

Constitutional Court. The absence of this mechanism led judges of general courts to ignore the grounds of constitutionality." [17]

It seems appropriate to empower judges of general jurisdiction to submit issues for consideration by the Constitutional Court. Such a step would be consistent with foreign practices (Germany, Italy, Korea, Russia).

The introduction of the constitutional complaint will contribute to the intensification of the Constitutional Court's activities and serve the implementation of Article 44 of the Constitution, where everyone is guaranteed judicial protection rights and freedoms. The importance of a constitutional complaint is not limited to enlargement of access to constitutional justice; it also serves as a legal mechanism to improve the quality and effectiveness of laws, ensure constitutionality, and further democratize the state's life society.

IV. Conclusion

The current development of constitutional control enshrined in the Constitutional Law "on the Constitutional Court of the Republic of Uzbekistan" of 2017 reflects many innovations. The number of eligible parties who have the standing to submit an issue to the Constitutional Court has been expanded. This step widens access to constitutional justice. This law also introduces a preventive control over the Constitution's compliance with constitutional laws and laws on international treaties' ratification. Nevertheless, the current state of constitutional review in Uzbekistan is static. The legal mechanisms for the implementation of constitutional justice need to be improved. Indirect access of citizens to constitutional justice is not an effective mechanism for ensuring effective protection of citizens' constitutional rights. The Court's judges' eligibility to initiate a constitutional review and their further participation in the proceedings contradicts the principle of impartiality and objectivity.

At present, policymakers plan to introduce constitutional complaint. Such a step will undoubtedly ensure effective protection of citizens' constitutional rights and freedoms and strengthen constitutional control.

While introducing a constitutional complaint, one should consider the following successful practices from constitutional courts of foreign countries;

[17] Pan Mohamad Faiz Kusuma. The Role of the Constitutional Court in Securing Constitutional Government in Indonesia. P.39. https://espace.library.uq.edu.au/data/UQ_412310/s4282430_final_thesis.pdf (Дата обращение 28.08.2020).

- Developing criteria for the admissibility of a constitutional complaint. In particular, the appeal is admissible provided that the constitutional rights and freedoms of citizens in the specific complete case were allegedly violated;
- The constitutional complaint must be brought no later than the term provided by law.
- Introducing a procedure for preliminary analysis of applications received from citizens and legal entities, verifying their compliance with the legislation's requirements, giving this right to the structural units of the Constitutional Court apparatus.

Simultaneously, it is necessary to adjust the legislative norms that govern the Court's deadlines of adopting a decision. In particular, deadlines should be synchronized with the timing of the signing and promulgation of laws by the President. It is also necessary to abandon the practice of initiating questions by judges of the Constitutional Court, giving judges of general jurisdiction the right to submit questions to the Constitutional Court.

Thus, the adoption of the new version of the Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan" will serve to strengthen constitutional control, strengthen constitutional legality in the country, improve constitutional proceedings and, ultimately, effectively protect the rights and freedoms of citizens guaranteed by the Constitution of the country.

【資料】

翻訳：ミャンマー連邦共和国緊急事態宣言（大統領府 2021 年命令第 1 号）
Translation: State of Emergency Declaration of Republic of the Union of Myanmar (Office of the President Order No. 1/2021)

牧 野　絵 美*
MAKINO Emi

目次

Ⅰ．はじめに

本稿は、ミャンマー連邦共和国（以下、「ミャンマー」という）において、2021 年 2 月 1 日に発令された緊急事態宣言（ミャンマー連邦共和国大統領府 2021 年命令第 1 号）の翻訳である。本翻訳は、2021 年 2 月 2 日付国営英字新聞 Global New Light of Myanmar に掲載された英語訳[1]を翻訳したものである。

2020 年 11 月 8 日、ミャンマー連邦共和国憲法（以下、「2008 年憲法」という）のもとで 3 度目の総選挙が行われた。本選挙の結果、与党である国民民主連盟（NLD）は、8 割以上の議席を獲得し[2]、圧勝した。しかし、国軍は、総選挙の有権者名簿をめぐり不正があったと主張し、選挙結果の受入を拒否した。2021 年 2 月 1 日、同選挙で選出された議員が招集される予定であったが、国軍は、連邦議会招集当日未明、ウィンミン大統領及びアウンサンスーチー国家顧問をはじめとする NLD 幹部を拘束した。その後、軍出身のミンスエ第 1

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[1] ミャンマー国営英字新聞 Global New Light of Myanmar "Republic of the Union of Myanmar Office of the President Order Number (1/2021)″（2021 年 2 月 2 日）https://www.gnlm.com.mm/republic-of-the-union-of-myanmar-office-of-the-president-order-number-1-2021/ （2021 年 2 月 26 日筆者最終アクセス）。

[2] 本選挙では、ラカイン州及びシャン州の一部の選挙区において治安上の理由で投票が延期となり、民選枠の人民院（下院）330 議席のうち 315 議席、民族院（上院）168 議席のうち 161 議席の選挙が行われた。連邦選挙管理委員会の発表によれば、NLD は、人民院で 258 議席（民選枠の 81.9%）、民族院で 138 議席（民選枠の 85.7%）を獲得した（ミャンマー国営英字新聞 Global New Light of Myanmar "Announcement of election result″（2020 年 11 月 16 日）https://www.gnlm.com.mm/announcement-of-election-results/ （2021 年 2 月 19 日筆者最終アクセス）。なお、両院議員の 4 分の 1 は、国軍最高司令官が指名する軍人枠である（2008 年憲法第 109 条(b)項及び第 141 条(b)項）。

副大統領が大統領代行に就任し[3]、ミンスエ大統領代行の名のもとに、2008 年憲法第 417 条[4]にもとづき大統領府 2021 年命令第 1 号が公布され、緊急事態を宣言するとともに、ミンアウンフライン国軍最高司令官が全権を掌握することとなった。

クーデター翌日の 2 月 2 日、2008 年憲法第 419 条[5]にもとづき、国軍最高司令官府 2021 年命令第 9 号が公布され、国家行政評議会（State Administration Council）が設置された[6]。同命令は、同評議会の職務を明らかにしていないが、現在までのところ、同評議会は、連邦大臣、連邦法務長官、連邦会計検査委員長、連邦選挙管理委員会構成員、連邦最高裁判所裁判官及び連邦憲法裁判所裁判官の任免など多数の人事権を行使するほか、軍政への抗議デモに対する取締りを強化するために市民のプライバシー保護及び治安に関する法律、刑法並びに刑事訴訟法の改正を行うなど、行政権及び立法権を行使している。

大統領府 2021 年命令第 1 号の合憲性については、いくつかの疑義がある。第 1 に、緊急事態を宣言する権限を有するのは大統領のみである（2008 年憲法第 417 条）。ウィンミン大統領の解任は、憲法上の手続が講じられず[7]、緊急事態を宣言した本命令を公布したミンスエ氏の大統領代行就任の正当性がなければ、緊急事態宣言は合憲とは言えない。第 2 に、緊急事態を宣言する前に、大統領は国防治安評議会と調整しなければならないが（2008 年憲法第 417 条）、ミンスエ大統領代行は、国防治安評議会のうち軍人評議員と調整を行ったのみである[8]。第 3 に、2008 年憲法第 417 条及び第 418 条にもとづき緊急事態を宣言した

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[3] 「辞任、死亡、永久的な障害又はその他の理由により、大統領が空席となった場合、2 名の副大統領のうち、大統領選挙時に 2 番目に高い得票数を得た 1 名は、大統領代行を務める」（2008 年憲法第 73 条(a)項）。

[4] 「暴動、暴力及び不法かつ強制的な手段により、連邦の主権を奪取する行為又は謀略に起因して、連邦の分裂、民族団結の分断若しくは主権の喪失が起こる緊急事態が発生する、又は発生する十分な理由がある場合、大統領は、国防治安評議会と調整の後、大統領令を発布し、緊急事態を宣言する。当該大統領令において、緊急事態が適用される領域は国家全土に及び、指定の期間が公布の日から 1 年であると明示するものとする」（2008 年憲法第 417 条）。

[5] 「主権が移譲された国軍最高司令官は、立法権、行政権及び司法権を行使する権限を有する。国軍最高司令官は、自ら又は自らを含む機関により、立法権を行使することができる。行政権及び司法権は、新たに設置された適切な組織又は適当な者に移譲し、当該機関又は者により行使されることが可能である」（2008 年憲法第 419 条）。

[6] 本命令により、国軍最高司令官を議長とし、軍人 8 名及び民間人 3 名の 11 名の評議員により、国家行政評議会が構成された。国軍最高司令官府 2021 年命令第 14 号（2021 年 2 月 3 日）により、5 名の民間人が評議員として追加され、同評議会は、軍人 8 名及び民間人 8 名の 16 名で構成されることとなった。

[7] 国軍による 2021 年 2 月 1 日のウィンミン大統領拘束に関する法的根拠は不明である。実際にウィンミン大統領が刑事責任を問われたのは、緊急事態宣言翌々日の 2 月 3 日であり、選挙活動中夫人及び娘とともに大統領官邸前で挨拶したことが、新型コロナウィルス感染症対策に違反するとして、災害管理法第 25 条にもとづき逮捕された（ミャンマー民間英字新聞 Myanmar Times "Myanmar State Counsellor and President charged, detained for 2 more weeks"（2021 年 2 月 4 日）https://www.mmtimes.com/news/myanmar-state-counsellor-and-president-charged-detained-2-more-weeks.html（2021 年 2 月 26 日筆者最終アクセス））。緊急事態宣言時に、2008 年憲法第 73 条(a)項が定める「その他の理由」により大統領が空席となったとは言い難く、2008 年憲法第 71 条が定める弾劾の手続も講じられていない。

[8] 国防治安評議会の構成員は、大統領、副大統領 2 名、人民院議長、民族院議長、国軍最高司令官、国軍副司令官、国防大臣、外務大臣、内務大臣及び国境大臣である（2008 年憲法第 201 条）。副大統領 1 名、国防大臣、内務大臣及び国境大臣は、軍人である（2008 年憲法第 60 条(b)項(iii)及び第 232 条(b)項(ii)）。国民の生命、住居及び財産が危険にさらされる緊急事態が発生する十分な理由がある場合、大統

場合、会期中であれば連邦議会の通常議会に、閉会中であれば連邦議会の緊急議会を招集し、国軍最高司令官に主権を移譲した事項を提出しなければならない（2008 年憲法第 421 条(a)項）。しかし、ミンスエ大統領代行は、緊急議会を招集し、主権移譲に関する報告を行っていない。第 4 に、国軍が主張する選挙不正には明確な根拠がない上に、選挙不正のみで、連邦の分裂、民族団結の分断又は主権の喪失を引き起こす緊急事態にあたると判断できるかである。これらのことにより、国内外からは、本命令による国軍最高司令官への全権移譲は違憲であり、軍事クーデターであると評されている。

Ⅱ．翻訳

ミャンマー連邦共和国緊急事態宣言（大統領府 2021 年命令第 1 号）（2021 年 2 月 1 日）

第 1 条　2020 年 11 月 8 日、連邦選挙管理委員会（Union Election Commission、以下「UEC」）の権限のもと、ミャンマー連邦共和国の総選挙が実施された。UEC は、自身の職務を適切に遂行できなかったのみならず、自由で公正かつ透明性のある選挙の確保を怠った。

第 2 条　国の主権は、市民に由来しなければならないが、自由で公正な選挙手続が行われなかったならば、ミャンマー連邦共和国の国家主権及び市民の権利に影響を与えかねない。

第 3 条　いくつかの政党、少数民族団体及び国軍により提起された選挙に関する申立に対応することを拒否し、その後人民院（下院）、民族院（上院）及び連邦議会を招集することは、ミャンマー連邦共和国憲法第 417 条に違反している。ミャンマー連邦共和国憲法第 417 条によると、「不法かつ強制的な手段（the wrongful focible means）」により権力を掌握することは、ミャンマーの主権及び民族の団結の喪失をもたらす。UEC の不十分な対応を不満に思う多くの人々が、UEC の対応に対して平和的な抗議を行った。

第 4 条　政府及び UEC の双方は事態に対応できなかったため、ミャンマーの最高法規であるミャンマー連邦共和国憲法第 417 条を適用し、ミャンマー連邦共和国憲法にしたがい「緊急事態」を宣言することは、国軍の否定できない責務である。

第 5 条　有権者の懸念に対応するために、ミャンマー政府は、「立法権、司法権及び行政権」を国軍最高司令官に移譲することを規定するミャンマー連邦共和国憲法第 418 条(a)項[9]を用いることとした。

領は、国軍最高司令官、国軍副司令官、国防大臣及び内務大臣と調整の後、直ちに緊急事態を宣言することができるが（2008 年憲法第 412 条(b)項）、第 417 条にはそのような規定はなく、すべての評議員の出席が必要であると考えられる。

[9] 「第 417 条にもとづく緊急事態宣言に関する事項において、大統領は、国軍最高司令官が連邦を迅速に元の状態に戻すために必要な措置を講ずることを可能にするために、連邦の立法権、行政権及び司法

第 6 条　ミャンマー連邦共和国憲法第 417 条にもとづき、本緊急事態宣言は、本日 2021 年 2 月 1 日から 1 年間有効なものとする[10]。

ミンスエ

大統領代行

ミャンマー連邦共和国

権を国軍最高司令官に移譲する。議会及び指導組織の立法機能は、宣言された日から停止されたものとみなされる。当該議会の任期満了の日に、当該議会は自動的に解散されたものとみなされる」（2008 年憲法第 418 条(a)）。

[10] 緊急事態宣言は、1 回の延長を 6 ヶ月とし、最大 2 回延長することが可能である（2008 年憲法第 421 条(b)項）。したがって、緊急事態宣言は最大 2 年間有効となる。

Nagoya University Asian Law Bulletin 規程

2015 年 7 月 1 日
2016 年 6 月 1 日改訂
編集委員会

1. 目的

本誌は、アジア諸国の法律・政治、法整備支援、および社会科学領域における日本語教育に関する学術研究に寄与することを目的とし、これらの分野における研究発表および情報提供の機会を提供する。

2. 投稿資格

以下に掲げる者は、本誌に投稿することができる。

①法学研究科および法政国際教育協力研究センターの専任教員、特任教員、研究員
②CALE 外国人研究員、CALE 院生・ポスドク研究協力員
③法学研究科の大学院生（指導教員による掲載の承認を要する。）
④その他編集委員会が認めた者

3. 掲載の種類

本誌には、第 1 項の分野に関する「論説」、「研究ノート」、「判例評釈」、「書評」、「資料」および「紹介」等の研究成果を掲載する。

その他、名古屋大学「法整備支援の研究」全体会議等の記録を掲載する。

4. 使用言語

本文の使用言語は、日本語または英語とする。

5. 字数

(1) 和文原稿の場合、「論説」は 2 万字程度、「研究ノート」等その他の場合は 1 万字程度とする。英文原稿の場合、「論説」は 8 千語程度、「研究ノート」等その他の場合は 4 千語程度とする。（図表、注、参考文献を含む。）
(2) 「研究ノート」等その他の場合であっても、貴重な資料を紹介する等の理由により、内容の性質上必要であると編集委員会が認める場合は、和文原稿は 2 万字程度まで、英文原稿は 8 千字程度まで掲載できるものとする。
(3) 研究報告等の記録については、字数制限を設けない。

6. 英文要旨

「論説」および「研究ノート」には、本文の使用言語に関わらず、300 語程度の英文要旨を添付する。

7. 執筆要領

原稿の執筆に関わる事項については、執筆要領を別途定める。

8. 投稿

(1) 投稿希望者は、発行 3 ヶ月前までに、編集委員会にメールで原稿を送付する。
（送付先：cale-publication@law.nagoya-u.ac.jp）
(2) 投稿の 2 週間前までに、原稿のタイトル、掲載の種類（論説・研究ノート等）および字数について、編集委員会に連絡をしなければならない。
(3) 投稿原稿は、完成原稿であること、未発表であることを要する。

9. 審査

(1) 原稿は、編集委員会における一定の審査をおこなったうえで掲載する。
(2) 投稿原稿については、内容・テーマ等を考慮し、編集委員会が 1 名または 2 名の査読者を選任することができる。
(3) 編集委員会は、査読者の意見をふまえて、掲載の可否を決定する。掲載の可否は、メールで投稿者に通知する。

10. 校正

初校のみを著者校正とし、その時点での大幅な加筆・修正は原則として認められない。

11. 発行

(1) 本誌は、原則として年 2 回発行する。創刊号は 2016 年 6 月 1 日発行とする。
(2) 本誌は、PDF 版を法政国際教育協力研究センター（CALE）ホームページに掲載する。

以上

Nagoya University Asian Law Bulletin 執筆要領

2015 年 7 月 1 日
編集委員会

1. 本文の使用言語は、日本語または英語とする。それ以外の言語、特殊な文字・記号を使用する場合は、編集委員会に相談のこと。

2. 本誌は原則として、掲載時にはすべて横組みとする。

3. 文字数は、「論説」の場合は、和文 20,000 字程度、英文 8,000 語程度とする。その他の場合（「研究ノート」、「書評」等）は、和文 10,000 字程度、英文 4,000 語程度とする。いずれの場合も図表、脚注、文献表示を含む。半角英数字は 0.5 字と換算する。

4. 第 1 ページには、表題、氏名、所属を記載する。本文は第 2 ページから始める。

5. 見出し番号は、以下に統一する。
章　I、II、III、……
節　1、2、3、……
項　(1)、(2)、(3)、……
目　(a)、(b)、(c)、……

6. 原稿は、原則として、Microsoft Word で作成する。それ以外のソフトを使用する場合は、事前に編集委員会に問い合わせること。

7. フォーマットは、以下の通りとする。
(1) 用紙サイズ：A4
(2) 余白：上 35mm、下 30mm、左 30mm、右 30mm
(3) 1 ページの文字数：横 40 字、縦 35 行（日本語）、縦 32 行（英語）
(4) 文字の大きさ：10.5 ポイント（日本語）、12 ポイント（英語）
(5) 文字の種類：MS 明朝（日本語）、Times New Roman（英数字）

8. 注は、以下の通りとする。
(1) 脚注はページの末尾に挿入する。（文末脚注ではない。）
(2) 文字の大きさ：8 ポイント（日本語）、9 ポイント（英語）とする。
(3) 文字の種類：本文と同様

9. 参考文献の表記方法については、著者の使い慣れたスタイルで良い。ただし、編集の過程で、編集委員会が調整を行う場合がある。

10. 図および表を挿入するときは、別紙に記載して提出する。図および表の見出しには通し番号を付し、挿入場所を指定する。

11. 「論説」および「研究ノート」の場合は、別紙にて 300 語程度の英文要旨（Abstract）を提出する。

以上

Nagoya University Asian Law Bulletin – Rules for Paper Submissions

July 1, 2015
Revision, June 1, 2016
Editorial Board

1. Objectives of the Bulletin

The Bulletin aims to contribute to the development of academic research on topics related to law and politics of countries in Asia, legal and rule of law development assistance, and Japanese language for social sciences, creating opportunities for publishing research and sharing information in the relevant fields.

2. Eligible Submitters

Eligible submitters are confined to the following:

- Faculty members and researchers of the Nagoya University Graduate School of Law and Center for Asian Legal Exchange
- CALE visiting scholars, CALE post-doctoral researchers, and CALE graduate affiliates
- Graduate students affiliated to the Graduate School of Law (publication approval by the academic advisor is required)
- Others as qualified by the editorial board

3. Categories of Articles

The Bulletin publishes research findings related to the fields listed in section 1 above, in the forms of research articles, research notes, case analyses, book reviews, documentation and book introductions.

In addition, proceedings of annual conference on "Legal Assistance Studies" will also be published in designated columns.

4. Language

Articles may be published either in Japanese or English.

5. Length

(1) For submission in Japanese, a research article shall be of about 20,000 characters. A research note or other types of articles shall be of about 10,000 characters. For submission in English, a research article shall be of about 8,000 words. A research note or other types of articles shall be of about 4,000 words. (These lengths are inclusive of graphics, footnotes and bibliography)

(2) For reasons deemed by the editorial board to be substantively relevant to the revelation of valuable data or documents, a research note etc. may be published up to the length of 20,000 characters in Japanese or 8,000 words in English.

(3) There is no length limits for records or proceedings related to a research report.

6. Abstract in English

Notwithstanding the language of the submission, a research article or a research note must be accompanied by a 300 words abstract in English.

7. Instructions to Authors

Instructions to authors regarding the preparation of the manuscript are detailed in a separate notice.

8. Submission Process

(1) Authors are requested to submit the full paper to the editorial board (email address cale-publication@law.nagoya-u.ac.jp) three months before the publication date;

(2) Authors must notify the editorial board of the title and category of article (i.e., research article or research note, etc.) and the approximate number of characters/words two weeks before submission of the full paper;

(3) The full paper is required to be complete and not-yet published elsewhere.

9. Peer-Review Process

(1) The full paper will be published only after having gone through deliberations by the editorial board.

(2) The editorial board may decide to appoint either one or two referees to review the submitted paper, taking into consideration its contents and theme(s) etc.

(3) The editorial board will decide on acceptance or rejection of the submission based on any comments made by the referee(s). The final decision will be notified to the author by email.

10. Revisions

The author is allowed to revise only the first draft of the full paper. However, as a matter of principle, any major revisions or additions even to the first draft are not acceptable.

11. Publication

(1) The Bulletin is published twice every year (end of September and end of March). The first volume will be published on September 30, 2015.

(2) The Bulletin is published in PDF form on the website of the Center for Asian Legal Exchange.

Nagoya University Asian Law Bulletin – Instructions to Authors

July 1, 2015
Editorial Board

1. The articles must be written either in Japanese or English. In case other languages, characters or phonetic symbols need to be used, the author is advised to consult with the editorial board in advance.

2. In principle, the scripts to be published are written in horizontal alignment.

3. A research article must be of about 20,000 characters in Japanese or about 8,000 words in English, whereas other types of articles (such as a research note or book review, etc.) shall be of about 10,000 characters in Japanese or about 4,000 words in English. These lengths are inclusive of graphics, footnotes and bibliography. Numbers written in half-width alphanumeric form will be counted as 0.5 character or word.

4. The title of the paper, the full name and affiliation of the author should be written on the first page of the submission. The text should start from the second page.

5. Heading and subheadings are expected to adopt the following orders:

   Chapter – I, II, III, …
   Section – 1, 2, 3, …
   Paragraph – (1), (2), (3), …
   Clause – (a), (b), (c), …

6. The paper should be in principle written in Microsoft Word. In case of different software being used, the author must consult with the editorial board in advance.

7. The page layout of the article must conform with the following details:

   (1) Paper size: A4
   (2) Margins: 35mm (top) and 30mm (bottom, left and right)
   (3) Number of characters and lines: (For Japanese) horizontally 40 characters on each line and vertically 35 lines; (For English) 32 lines.
   (4) Word size: 10.5 pt (Japanese); 12 pt (English).
   (5) Word font: MS Mincho (Japanese); Times New Roman (English).

8. Notes should be set as follows:

   (1) Footnotes at the end of the relevant pages, not endnotes.
   (2) Word size: 8 pt (Japanese); 9 pt (English).
   (3) Word font: Consistent with the main text.

9. Authors should feel free to prepare the bibliography following the style which they are familiar with. However, the editorial board reserves the right to do adjustments as may be necessary in editing.

10. Graphics, pictures or tables should be submitted in a separate file. Captions for these graphics, pictures or tables should be properly numbered with specific indication of the place to which they are expected to belong in the final published version.

11. Authors are required to submit a 300-word abstract in English, in case the submission is a research article or a research note.

～ 編集後記 ～

Asian Law Bulletin の第 6 号をお届けします。2020 年 1 月に開催した名古屋大学「法整備支援」全体会議「アジアにおける立憲主義の諸相―アジア的「文脈」とその論理―」での報告をベースとした論文を特集として掲載しました。

掲載された論文を読みすすめると「立憲主義」（Constitutionalism）というコンセプト自体が、各国・各地域の歴史的文化的政治的文脈の中ですぐれて多様であることがわかります。他方、その多様性の中から法システムの存在意義をさらに明らかにしていくという課題もまた明らかになったといえます。CALE は、名古屋大学法学研究科と協同しつつ、これに代表される先進的国際的な共同研究を積極的に展開しておりますが、その成果をこうして国際ジャーナルとして確実に公表していくことは CALE に課せられた重要な使命でもあります。

これらの特集論文に加え、2021 年 2 月 1 日のミャンマー軍事クーデターに際し公表された「ミャンマー連邦共和国緊急事態宣言」の邦訳を解題と共に急遽掲載いたしました。ミャンマー情勢は日に日に厳しいものとなっておりますが、一刻も早く民主政へ復帰できることを願うばかりです。ミャンマーの情勢は奇しくも本号特集の立憲主義や法の支配の意義が問われる事態となっています。本号特集に掲載されている Khin Khin Oo 氏の論文は 2008 年ミャンマー憲法を取り上げております。ぜひ他の論文と合わせて、ご一読ください。時間の限られた中、全体の編集作業と並行して翻訳の労に当たられた牧野絵美講師に感謝の意を表します。

なお、毎年 12 月から 1 月にかけて開催している「法整備支援」全体会議は、2021 年度開催分より「CALE 年次大会（Annual Conference）」と衣替えいたしました。法整備支援研究にとどまらずアジア法研究や比較法学研究を中心に今後とも広く研究活動を展開していくようスタッフ一同決意を新たにしております。引き続きのみなさまのご指導ご鞭撻のほどどうぞよろしくお願いいたします。

ALB 編集委員長

藤本亮（名古屋大学法政国際教育協力研究センター長）

Nagoya University Asian Law Bulletin　第 6 号

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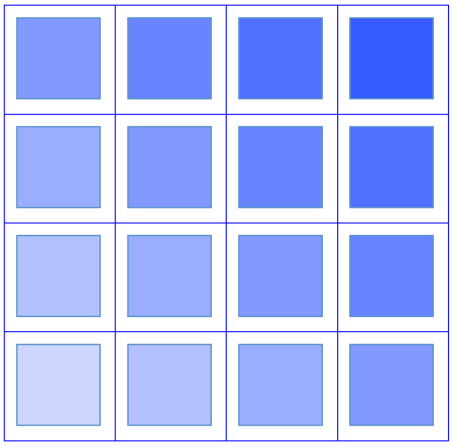

Center for Asian Legal Exchange